1290 No. 3679 1291

United States

Circuit Court of Appeals

For the Ninth Circuit.

LOUIS CABIALE and ANDREW DONIZELLO,
Plaintffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

FILED
SEP 16 1921
F. D. MONCKTON,
CLERK.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

For Defendants and Plaintiffs in Error:

CHAUNCEY F. TRAMUTOLO, Esq., San Francisco.

For Plaintiff and Defendant in Error:

U. S. ATTORNEY, San Francisco, Calif.

UNITED STATES OF AMERICA.

District Court of the United States, Northern District of California.

No. 8602.

CLERK'S OFFICE.

UNITED STATES OF AMERICA

vs.

LOUIS CABIALE et al.

Praecipe for Transcript on Writ of Error.

To the Clerk of Said Court:

Sir: Please prepare transcript on writ of error, and include the following papers and proceedings:

Information.

Minutes of July 31, September 21, 22, October 2, 6, 1920.

Verdict.

Motion for New Trial.

Motion in Arrest of Judgment.

Judgment.

Petition for Writ of Error.

Order Allowing Writ of Error.

Assignment of Errors.
Bill of Exceptions.
Original Writ of Error.
Original Citation on Writ of Error.
This Praecipe.

C. F. TRAMUTOLO,
Attorney for Defendants.

[Endorsed]: Filed Mar. 17, 1921. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [1*]

In the Southern Division of the District Court of the United States, Northern District of California, First Division.

No. 8602.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LOUIS CABIALE, ANDREW DONIZELLO, PIETRO GABALIO, G. BERTOLOTTI, PETER ZURICH, ATTILIO PARCELLINI, FRANK COLAI and DANTE FORASIEPI,
Defendants.

Information.

At the July term of said court, in the year of our Lord one thousand nine hundred and twenty.

BE IT REMEMBERED that Frank M. Silva,

*Page-number appearing at foot of page of original certified Transcript of Record.

United States Attorney for the Northern District of California, by and through Albert M. Hardie, Assistant United States Attorney, who for the United States in its behalf prosecutes in his own proper person, comes into court on this, the 29th day of July, 1920, and with leave of said Court first having been had and obtained, gives the Court to understand and be informed as follows, to wit: That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath, and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof;

NOW THEREFORE, your informant presents: THAT Louis Cabiale, Andrew Donizello, Pietro Gabalio, G. Bertolotti, Peter Zurich, Attillio Parcellini, Frank Colai and Dante Forasiepi, hereinafter [2] called the defendants heretofore, to wit, on the 22d day of July, 1920, at 1549 Stockton Street, in the city and county of San Francisco, in the Southern Division of the Northern District of California, after the date upon which the Eighteenth Amendment to the Constitution of the United States went into effect, did unlawfully, wilfully and knowingly, in violation of Section 21, Title II of the Act of October 28th, 1919, known as the National Prohibition Act, maintain a common nuisance in that they did unlawfully, wilfully and knowingly keep on the premises situated at said 1549 Stockton Street known as the Gianduja Hotel, Restaurant, Café and Bar certain intoxicating liquor, to wit, claret wine

containing one-half of one per cent or more of alcohol by volume, which said liquor was then and there fit for use for beverage purposes.

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided.

SECOND COUNT.

And affiant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof.

NOW THEREFORE, your informant presents, THAT Louis Cabiale, Andrew Donizello, Pietro Gabalio, G. Bertollotti, Peter Zurich, Attilio Parcellini, Frank Colai and Dante Forasiepi, hereinafter called the defendants heretofore, to wit, on the 22d day of July, at 1549 Stockton Street, in the County of San Francisco, in the Southern Division of the Northern District of California, then and there being, after the date upon which the 18th Amendment to the Constitution of the United States went into effect, unlawfully, [3] wilfully and knowingly, in violation of Section 3, Title II, of the Act of October 28, 1919, known as the National Prohibition Act, have in their possession certain intoxicating liquor, to wit, claret wine, containing one-half of one per cent or more of alcohol by volume,

which said liquor was then and there fit for use for beverage purposes.

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided.

THIRD COUNT.

And affiant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit, made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof.

NOW THEREFORE, your informant presents: THAT Louis Cabiale, Andrew Donizello, Pietro Gabalo, G. Bertollotti, Peter Zurich, Attilio Parcellini, Frank Colai and Dante Forasiepi hereinafter called the defendants heretofore to wit, on the 22d day of July, 1920 at 1549 Stockton Street in the city and county of San Francisco in the Southern Division of the Northern District of California, then and there being, after the date upon which the 18th Amendment to the Constitution of the United States went into effect, did then and there unlawfully, wilfully and knowingly in violation of Section 3, Title II of the Act of October 28, 1919, known as the National Prohibition Act, sell certain intoxicating liquor, to wit, claret wine, containing one-half of one per cent or more of alcohol by volume and then and there fit for use for beverage purposes. That the

sale of the said intoxicating liquor by the said defendants at [4] the time and place aforesaid was then and there prohibited and unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the "National Prohibition Act."

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided.

FOURTH COUNT.

And affiant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit, made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof.

NOW THEREFORE, your informant presents: THAT Louis Cabiale, Andrew Donizello, Pietro Gabalo, G. Bertollotti, Peter Zurich, Attilio Parcellini, Frank Colai and Dante Forasiepi hereinafter called the defendants heretofore to wit, on the 22d day of July, 1920 at 1549 Stockton Street in the city and county of San Francisco in the Southern Division of the Northern District of California, then and there being, after the date upon which the 18th Amendment to the Constitution of the United States went into effect, did then and there unlawfully, wilfully and knowingly in violation of Section 3, Title II of the Act of October 28, 1919, known as the Na-

tional Prohibition Act, sell certain intoxicating liquor, to wit, claret wine, containing one-half of one per cent or more of alcohol by volume and then and there fit for use for beverage purposes. That the sale of the said intoxicating liquor by the said defendants at the time and place aforesaid was then and there prohibited and [5] unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the "National Prohibition Act."

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided.

FIFTH COUNT.

And affiant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit, made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof.

NOW THEREFORE, your informant presents: THAT Louis Cabiale, Andrew Donizello, Pietro Gabalo, G. Bertollotti, Peter Zurich, Attilio Parcellini, Frank Colai and Dante Forasiepi hereinafter called the defendants heretofore to wit, on the 22d day of July, 1920, at 1549 Stockton Street in the city and county of San Francisco, in the Southern Division of the Northern District of California, then and there being, after the date upon which the 18th

Amendment to the Constitution of the United States went into effect, did then and there unlawfully, wilfully and knowingly in violation of Section 3, Title II of the Act of October 28th, 1919, known as the National Prohibition Act, sell certain intoxicating liquor, to wit, claret wine, containing one-half of one per cent or more of alcohol by volume and then and there fit for use for beverage purposes. That the sale of the said intoxicating liquor by the said defendants at the time and place aforesaid was then and there prohibited and unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to-wit, the "National Prohibition Act." [6]

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided.

SIXTH COUNT.

And affiant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit, made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof.

NOW THEREFORE, your informant presents: THAT Louis Cabiale, Andrew Donizello, Pietro Gabalo, G. Bertollotti, Peter Zurich, Attilio Parcellini, Frank Colai and Dante Forasiepi hereinafter called the defendants heretofore to wit, on the 22d

day of July, 1920, at 1549 Stockton Street in the city and county of San Francisco, in the Southern Division of the Northern District of California, then and there being, after the date upon which the 18th Amendment to the Constitution of the United States went into effect, did then and there unlawfully, wilfully and knowingly in violation of Section 3, Title II of the Act of October 28, 1919, known as the National Prohibition Act, sell certain intoxicating liquor, to wit, claret wine, containing one-half of one per cent or more of alcohol by volume and then and there fit for use for beverage purposes. That the sale of the said intoxicating liquor by the said defendants at the time and place aforesaid was then and there prohibited and unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the "National Prohibition Act."

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided. [7]

SEVENTH COUNT.

And affiant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit, made under oath, and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof,

NOW THEREFORE, your informant presents: Louis Cabiale, Andrew Donizello, Pietro Gabalo, G. Bertollotti, Peter Zurich, Attilio Parcellini, Frank Colai and Dante Forasiepi, hereinafter called the defendants, to wit, on the 23d day of July, 1920, at 1549 Stockton Street in the city and county of San Francisco, in the Southern Division of the Northern District of California, then and there being, after the date upon which the 18th Amendment to the Constitution of the United States went into effect, did then and there unlawfully, wilfully and knowingly maintain a common nuisance in that the said defendants did then and there at the said 1549 Stockton Street on the premises known as the Gianjuja Hotel, Restaurant, Café and Bar keep certain intoxicating liquor, to wit, claret wine, jackass brandy, vermouth and mareschini, containing one-half of one per cent or more of alcohol by volume and then and there fit for use for beverage purposes.

That the keeping of the said intoxicating liquor at the time and place aforesaid by the said defendants was then and there prohibited, unlawful and in violation of Section 21 of Title II of the Act of Congress of October 28, 1919, to wit, the "National Prohibition Act."

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided. [8]

EIGHTH COUNT.

And affiant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit, made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof.

NOW THEREFORE, your informant presents: THAT Louis Cabiale, Andrew Donnizzello, Pietro Gabalo, G. Bertollotti, Peter Zurich, Attilio Parcellini, Frank Colai and Dante Forasiepi, hereinafter called the defendants, to wit, on the 23d day of July, 1920, at 1549 Stockton Street in the city and county of San Francisco, in the Southern Division of the Northern District of California, then and there being, after the date upon which the 18th Amendment to the Constitution of the United States went into effect, did then and there unlawfully, wilfully and knowingly have in their possession certain intoxicating liquor, to wit, claret wine, jackass brandy, vermouth and mareschino containing one half of one per cent or more of alcohol by volume and then and there fit for use for beverage purposes.

That the possession of the said intoxicating liquor by the said defendants at the time and in the place aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided. [9]

NINTH COUNT.

And affiant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit, made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof.

NOW, THEREFORE, your informant presents THAT Louis Cabiale, Andrew Donnizello, Pietro Gabalo, G. Bertollotti, Peter Zurich, Attilio Parcellini, Frank Colai and Dante Forasiepi, hereinafter called the defendants, to wit, on the 23d day of July, 1920, at 1549 Stockton Street in the city and county of San Francisco, in the Southern Division of the Northern District of California, then and there being, after the date upon which the 18th Amendment to the Constitution of the United States went into effect, did then and there unlawfully, wilfully and knowingly furnish to George Poultney and C. W. Herbert certain intoxicating liquor, to wit, claret wine, containing one-half of one per cent or more of alcohol by volume and then and there fit for use for beverage purposes.

That the furnishing of the said intoxicating liquor by the said defendants at the time and in the place aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided. [10]

TENTH COUNT.

And affiant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit, made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof.

NOW, THEREFORE, your informant presents THAT Louis Cabiale, Andrew Donnizello, Pietro Gabalo, G. Bertollotti, Peter Zurich, Attilio Parcellini, Frank Colai and Dante Forasiepi, hereinafter called the defendants, to wit, on the 23d day of July, 1920, at 1549 Stockton Street in the city and county of San Francisco, in the Southern Division of the Northern District of California, then and there being, after the date upon which the 18th Amendment to the Constitution of the United States went into effect, did then and there unlawfully, wilfully and knowingly furnish to George Poultney and C. W. Herbert certain intoxicating liquor, to wit, cocktails containing one half of one per cent or more of alcohol by volume and then and there fit for use for beverage purposes.

That the furnishing of the said intoxicating liquor by the said defendants at the time and in the place aforesaid was then and there prohibited, unlawful

and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided. [11]

ELEVENTH COUNT.

And affiant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit, made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof.

NOW, THEREFORE, your informant presents THAT Louis Cabiale, Andrew Donnizello, Pietro Gabalo, G. Bertollotti, Peter Zurich, Attilio Parcellini, Frank Colai and Dante Forasiepi, hereinafter called the defendants, to wit, on the 23d day of July, 1920, at 1549 Stockton Street in the city and county of San Francisco, in the Southern Division of the Northern District of California, then and there being, after the date upon which the 18th Amendment to the Constitution of the United States went into effect, did then and there unlawfully, wilfully and knowingly sell certain intoxicating liquor, to wit, whiskey, containing one-half of one per cent or more of alcohol by volume and then and there fit for use for beverage purposes.

That the sale of the said intoxicating liquor by

the said defendants at the time and in the place aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided.

FRANK M. SILVA,
United States Attorney,
ALBERT M. HARDIE,
Assistant United States Attorney,
Attorneys for Plaintiff. [12]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

George Poultney, being duly sworn, deposes and says: THAT Louis Cabiale, Andrew Donizello, Pietro Gabalio, G. Bertolotti, Peter Zurich, Attilio Parcellini, Frank Colai, Dante Forasiepi, on the 22d day of July, 1920, at San Francisco, in the county of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, did then and there possess certain intoxicating liquor, to wit, wine, containing one-half of one per cent or more of alcohol by volume, which said liquor was then and there fit for use for beverage purposes.

That the possession of the said intoxicating liquor by the said defendants was then and there prohibited, unlawful, and in violation of Section 3, Title

II, of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

And affiant aforesaid on his oath aforesaid, doth further depose and says: That Louis Cabiale, Andrew Donizello, Pietro Gabalio, G. Bertolatti, Peter Zurich, Attilio Parcellini, Frank Colai, Dante Forasiepi, on July 22, 1920, at San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, did then and there maintain a common nuisance in that the said defendants did keep on the premises at 1549 Stockton Street, known as Gianduja Café and Restaurant, intoxicating liquor, to wit, wine, containing one-half of one per cent or more of alcohol in volume, which was then and there fit for use for beverage purposes.

That the keeping of the said intoxicating liquor by the said defendants was then and there prohibited, unlawful, and in violation of Section 21, of Title II, of the Act of October 28, 1919, to wit, the National Prohibition Act. [13]

And affiant aforesaid on his oath aforesaid, doth further depose and say: That Louis Cabiale, Andrew Donizello, Pietro Gabalio, G. Bertolatti, Peter Zurich, Attilio Parcellini, Frank Colai, Dante Forasiepi, on July 2, 1920, at San Francisco, California, and within the jurisdiction of this Court, did then and there sell on the premises at 1549 Stockton St., known as the Gianduja Café and Restaurant, intoxicating liquor, to wit, claret wine, containing one-half of one per cent or more of alcohol by volume,

which said liquor was then and there fit for use for beverage purposes.

That the selling of the said intoxicating liquor by the said defendants was then and there prohibited, unlawful and in violation of Section 3, Title II, of the Act of October 28, 1919, to wit, the National Prohibition Act.

And affiant aforesaid on his oath aforesaid, doth further depose and say: That, Louis Cabiale, Andrew Donizello, Pietro Gabalo, G. Bertolotti, Peter Zurich, Attilio Parcellini, Frank Colai, Dante Forasiepi, on July 22, 1920, at San Francisco, California, and within the jurisdiction of this Court, did then and there sell on the premises at 1549 Stockton St., known as Gianduja Café and Restaurant, intoxicating liquor, to wit, claret wine, containing one-half of one per cent or more of alcohol by volume which was then and there fit for usė for beverage purposes.

And affiant aforesaid on his oath aforesaid, doth further depose and say: That Louis Cabiale, Andrew Donizello, Pietro Gabalio, G. Bertolotti, Peter Zurich, Attilio Parcellini, Frank Colai, Dante Forasiepi, on July 22, 1920, at San Francisco, California, and within the jurisdiction of this Court, did then and there sell on the premises at 1549 Stockton Street, known as Gianduja Café and Restaurant, intoxicating liquor, to wit, claret wine, containing one-half of one per cent or more of alcohol by volume, which was [14] then and there fit for use for beverage purposes.

That the sales of the said intoxicating liquor by

the said defendants was then and there prohibited, unlawful and in violation of Section 3 of Title II, of the Act of October 28, 1919, to wit, the National Prohibition Act.

And affiant aforesaid on his oath aforesaid, doth further depose and say: That Louis Cabiale, Andrew Donizello, Pietro Gabalio, G. Bertolotti, Peter Zurich, Attilio Parcellini, Frank Colai, Dante Forasiepi, on July 22, 1920, at San Francisco, California, and within the jurisdiction of this Court, did then and there sell on the premises at 1549 Stockton Street, known as the Gianduja Café and Restaurant, intoxicating liquor, to wit, claret wine, containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

And affiant aforesaid on his oath aforesaid, doth further depose and say: That Louis Cabiale, Andrew Donizello, Pietro Gabalio, G. Bertolotti, Peter Zurich, Attilio Parcellini, Frank Colai, and Dante Forasiepi, on July 2, 1920, at San Francisco, California, and within the jurisdiction of this Court, did then and there sell on the premises at 1549 Stockton Street, known as Gianduja Café and Restaurant, intoxicating liquor, to wit, claret wine, containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the sale of the said intoxicating liquor by the said defendants was then and there prohibited, unlawful and in violation of Section 3 of Title II

of the Act of October 28, 1919, to wit, the National Prohibition Act. [15]

And affiant aforesaid on his oath aforesaid, doth further depose and say: That Louis Cabiale, Andrew Donizello, Pietro Gabalio, G. Bertolotti, Peter Zurich, Attilio Parcellini, Frank Colai and Dante Forasiepi, on July 23, 1920, at San Francisco, California, and within the jurisdiction of this Court, did then and there maintain a common nuisance in that the said defendants did keep on the premises at 1549 Stockton Street, known as the Gianduja Café and Restaurant, intoxicating liquor, to wit, claret wine, vermouth and mareschini containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the keeping of the said intoxicating liquor by the said defendants was then and there prohibited, unlawful and in violation of Section 21 of Title II, of the Act of October 28, 1919, to wit, the National Prohibition Act.

And affiant aforesaid on his oath aforesaid, doth further depose and say: That Louis Cabiale, Andrew Donizello, Pietro Gabalio, G. Bertolotti, Peter Zurich, Attilio Parcellini, Frank Colai and Dante Forasiepi, on July 23, 1920, at San Francisco, California, and within the jurisdiction of this Court, did then and there possess intoxicating liquor, to wit, red wine, jackass brandy, vermouth and mareschino wine, containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the possession of the said intoxicating liquor by the said defendants was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of October 28, 1919, to wit, the National Prohibition Act. [16]

And affiant aforesaid doth further depose and say: That Louis Cabiale, Andrew Donizello, Pietro Gabalio, G. Bertolotti, Peter Zurich, Attilio Parcellini, Frank Colai and Dante Forasiepi, on July 23, 1920, at San Francisco, aforesaid did then and there furnish to the said affiant and C. W. Herbert certain intoxicating liquor, to wit, wine, containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

And affiant aforesaid on his oath aforesaid, doth further depose and say: Louis Cabiale, Andrew Donizello, Pietro Gabalio, G. Bertolotti, Peter Zurich, Attilio Parcellini, Frank Colai and Dante Forasiepi, on July 23, 1920, at San Francisco, did then and there sell on the premises at 1549 Stockton Street, intoxicating liquor, to wit, whiskey, containing one-half of one per cent or more of alcohol by volume, which was then and there fit for use for beverage purposes.

And affiant aforesaid on his oath aforesaid, doth further depose and say: That Louis Cabiale, Andrew Donizello, Pietro Gabalio, G. Bertolotti, Peter Zurich, Attilio Parcellini, Frank Colai and Dante Forasiepi, on July 23, 1920, at San Francisco, California, and within the jurisdiction of this Court, did then and there furnish to George Poultney and C. W. Herbert certain intoxicating liquor, to wit,

cocktails, containing one-half of one per cent or more of alcohol by volume, which said liquor was then and there fit for use for beverage purposes.

That the furnishing and selling of the said intoxicating liquor by the said defendants was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of [17] October 28, 1919, to wit, the National Prohibition Act.

GEORGE POULTNEY.

Subscribed and sworn to before me this 28th day of July, 1920.

[Seal] FRANCIS KRULL,
United States Commissioner Northern Dist. of California.

[Endorsed]: Filed July 29th, 1920. W. B. Maling, Clerk. By Lyle S. Morris, Deputy. [18]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Saturday, the 31st day of July, in the year of our Lord one thousand nine hundred and twenty. Present: The Honorable WILLIAM H. SAWTELLE, Judge.

No. 8602.

UNITED STATES OF AMERICA

vs.

LOUIS CABIALE, ANDREW DONIZELLO, PIETRO GAVELLO, G. BERTOLOTTI, PETER ZURICH, ATTILIO PARCELLINI, FRANK COPPOLO and DANTE FORASIEPI

Minutes of Court—July 31, 1920—Pleas.

In this case the defendants were present with attorney, C. F. Tramutolo, Esq., and A. M. Hardie, Esq., Asst. U. S. Atty., was present on behalf of the United States. After hearing the respective attorneys, arraignment was waived, and pleas of "Not Guilty" as to each defendant was entered herein, and this case ordered continued to September 17, 1920, for trial, and that each of said defendants have until August 3, 1920, within which to give bonds for appearance herein. [19]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 21st day of September in the year of our Lord one thousand nine hundred and twenty. Present: The Honorable MAURICE T. DOOLING, Judge.

No. 8602.

UNITED STATES OF AMERICA

vs.

LOUIS CABIALE et al.

Minutes of Court—September 21, 1920—Trial.

This case came on regularly this day for the trial of defendants herein, who were present with attorney, C. F. Tramutolo, Esq., B. F. Geis, Esq., and A. M. Hardie, Esq., Asst. U. S. Attys., were present on behalf of the United States. Upon the calling of the case all parties answering ready for such trial the Court ordered that the same do proceed and that the jury-box be filled from the regular panel of trial jurors of this Court. Accordingly the hereinafter named persons were duly drawn by lot, sworn and examined, etc., as follows: William R. Pentz, Alexander S. Ireland, Andrew Armstrong, E. H. Jones, Winthrop P. Austin, E. R. Brady, and John C. Bateman, accepted; J. M. Dupas, good cause appearing therefor, the Court ordered that said juror be excused; Warren Spieker, good cause appearing therefor, the Court ordered that said juror be excused; C. H. Adams, accepted; M. H. Falkenstein and Benj. E. Laskey, good cause appearing therefor, the Court ordered that said jurors be excused; Edwin R. Jackson, accepted; F. A. Smith, challenged for cause by the United States, allowed, and juror excused; F. W. Gerlash and Louis B. Gorgers, accepted; E. H. O'Brien, peremptorily challenged by the United States and excused;

and A. W. Hollard, accepted. Thereupon twelve (12) persons having been accepted as jurors to try the defendants herein were accordingly sworn, to wit: [20]

William R. Pentz,	John C. Bateman,
Alexander S. Ireland,	C. H. Adams,
Andrew Armstrong,	Edwin R. Jackson,
E. H. Jones,	F. W. Gerlash,
Winthrop P. Austin,	Louis B. Gorgers,
E. R. Brady,	A. W. Hollard.

Mr. Hardie made statement to the Court and jury of the nature of the case, and Mr. Geis called George W. Poultney, A. R. Shurtleff, H. M. Kupser, W. D. Smith, Sam Shaen, William J. Jordan, Harry C. Drew, W. L. Estelle, A. M. Hardie and R. F. Love, each of whom was duly sworn and examined on behalf of the United States, and introduced in evidence certain exhibits which were filed and marked United States Exhibits Nos. 3 (checks), 1 and 2 (same as 1 and 2 for identification), 6, 7, 8 and 9 (bottles and contents), and presented and filed for identification certain exhibits which were marked United States Exhibits 1, 2, 4 and 5 (for identification) (bottles and contents), and thereupon rested case on behalf of the United States.

Mr. Tramutolo thereupon moved the Court for an order to instruct the jury herein to return a verdict of not guilty as to defendant, Pietro Gavello and certain other defendants, which motion, after hearing Mr. Tramutolo, the Court ordered denied.

The hour of adjournment having arrived, the Court further ordered that the trial of this case be

continued to September 22, 1920, and that all parties be and appear accordingly. [21]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Wednesday, the 22d day of September in the year of our Lord, one thousand nine hundred and twenty. Present: the Honorable MAURICE T. DOOLING, Judge.

No. 8602.

UNITED STATES OF AMERICA

vs.

LOUIS GABIALE, FRANK COPPOLA, PETER ZURICH, DANTE FORASIEPI, P. GAVELLO, ANDREW DONIZELLO, G. BERTOLOTTI, and ATTILIO PARCELLINI.

Minutes of Court—September 22, 1920—Trial (Continued).

This case came on regularly this day for further trial of said defendants, who were present with attorney S. F. Tramutolo, Esq., B. F. Geis, Esq., and A. M. Hardie, Esq., Asst. U. S. Attys., were present on behalf of the United States. The Jury heretofore impaneled and sworn to try said defendants was present and complete. Mr. Tramutolo moved the Court for an order instructing the jury herein to return a verdict of not guilty as to defendants,

Dante Forasiepi, Frank Coppola and Peter Zurich, and after hearing Mr. Tramutolo, the Court ordered that said motion be denied. Mr. Tramutolo, recalled W. D. Smith, who was further cross examined on behalf of defendants. Mr. Tramutolo then called Louis Cabiale, Frank Coppola, Peter Zurich (defendant), each of whom was duly sworn and examined on behalf of defendants. E. M. Ratto was duly sworn as interpreter herein. Mr. Tramutolo then called Dante Forasiepi (defendant) who was duly sworn and examined on behalf of defendants through interpreter. P. Gavello, Andrew Donizello, G. Battaglia, A. Cesena and E. M. Ratto were each duly sworn and examined on behalf of defendants. Mr. Tramutolo introduced in evidence a certain book which was filed and marked Defendant's [22] Exhibit No. 1, and thereupon rested case of defendants. Mr. Geis then recalled in rebuttal George W. Poultney, W. D. Smith, H. C. Drew and W. J. Jordan, each of whom was further examined on behalf of the United States, and thereupon rested case on behalf of the United States. The Court ordered that United States Exhibits 4 and 5 for Identification be introduced in evidence and the same were marked United States Exhibits Nos. 4 and 5 (bottles and contents).

The case was then argued by Mr. Hardie, Mr. Tramutolo, and Mr. Geis and submitted; whereupon the Court proceeded to instruct the jury herein, and as a part thereof withdraw the 11th Count of the Information filed herein from the consideration of the jury, and after being so instructed

the jury herein retired at 4:05 o'clock P. M., to deliberate upon a verdict and subsequently returned into Court at 6:20 o'clock P. M., and upon being called all twelve (12) jurors answered to their names, and in answer to question of Court stated that they had agreed upon a verdict and presented a written verdict, which the Court ordered filed and recorded, viz:

"We, the Jury, find as to the defendants at the bar, as follows, Louis Cabiale, Guilty on Counts 2, 3, 8, Not Guilty on Counts 1, 4, 5, 6 and 7; Andrew Donizello, Guilty on Counts 2, 3 8, 9, 10, Not Guilty on Counts 1, 4, 5, 6 and 7; P. Gavello, Head Waiter, Not Guilty on all Counts; G. Bartolotti, Bar Tender, Not Guilty on all Counts; Peter Zurich, Not Guilty on all Counts; Attillio Parcellini, Not Guilty on all counts; Dante Farasiepi, Not Guilty on all Counts; Frank Coppola Not Guilty on all Counts.

WM. R. PENTZ,
Foreman."

After hearing the respective attorneys, the Court ordered that matter of judgments as to defendants, Louis Cabiale and Andrew Donizello be continued to September 25, 1920, and in the meantime said defendants go at large upon the bonds heretofore given for appearance herein, and that the other defendants found not guilty be forthwith discharged, that they go hence without day and that their [23] bonds heretofore given for their appearance herein be exonerated. Further ordered that Defendants' Exhibit No. 1 be returned to the defendants, and

accordingly said exhibit was returned to defendant Louis Cabiale in open court. [24]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 8602.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOUIS CABIALE et al.,

Defendants.

Bill of Exceptions.

BE IT REMEMBERED: That on the twentieth day of September 1920, the cause of United States of America, vs. Louis Cabiale, Andrew Donizello, Pietro Gabalio, G. Bertolotti, Peter Zurich, Attilio Porcellini, Frank Colai, Dante Forasiepi, came on regularly to trial before the Honorable Maurice T. Dooling, Judge of the above-entitled court, Ben F. Geis, Assistant United States Attorney and Albert M. Hardie, Assistant United States Attorney appearing on behalf of the United States, and Chauncey F. Tramutolo, Esq., appearing on behalf of the said defendants.

Thereupon a jury was duly empaneled and sworn, and the following proceedings were had and taken.

Testimony of George Poultney, for the Government.

GEORGE POULTNEY, called as a witness for the United States, and being first duly sworn, testified as follows:

I am a Federal prohibition agent and have been such since the time prohibition took effect, sometime in January 1920. I have seen all of these defendants at different times, some of them at the place of business and some at the Commissioner's office. I recall seeing them on the evening of the raid of what is called the Gianduja place. On the night the place was raided, I went there about a quarter past or half past nine at night. I observed the first gentleman with the mustache, the defendant Cabiale; the next gentleman he was at the cash register, and the third gentleman I observed going back and [25] forth in the restaurant. I don't think he was a waiter. That night I went to the restaurant, and I ordered dinner, and ordered four glasses of claret, which were served me, then, later on during the evening, I ordered four cocktails, which were served; two of the glasses of claret were drunk and two of the cocktails were drunk, and the place was raided, and some of the officers took the wine and cocktails that were remaining from the table at which I was sitting. There were four people with me that evening, Mr. Herbert who is now in Honolulu and two ladies. I don't know where the ladies are now. I did the ordering for myself and the other three, I ordered the meal and the liquor, I drank

(Testimony of George Poultney.)

part of it. I know it was claret. The place is located at 1549 Stockton Street in this city and county. After we drank the claret we ordered the cocktails, they consisted of some sort of an alcoholic concoction; off hand, I would say it was jackass brandy and vermouth. Four of these were ordered. I did not order any further drinks that evening, we did not have a chance to order any further drinks. I was in the place of Mr. Cabiale and these gentlemen on July 22, the evening before. I saw Mr. Cabiale there, I believe, on that evening, and I observed, as I was leaving, the gentleman with the bald head, next to Mr. Cabiale on that evening we bought four glasses of claret. On the first night, the first time we went there they charged 25 cents a drink for the claret; the next night for some reason, we did not pay anything at all. The reason was everybody said the place was raided, and we had better get out of there, so I, with my party, we got out, with the rest of the patrons of the place. On the evening of the 22d we paid for the claret, 25 cents a drink. On the 22d we had two rounds, we drank the claret; one of the glasses we poured into a bottle—one of the glasses of claret. The first night I had spoken to Mr. Cabiale and told him that I had come down for a little something to eat, and I wanted to get something to drink, and he said that was all right, I could have what I wanted. I do not see anybody here of these defendants that served the liquor on that night. (To Mr. Tramutolo.) I do not observe

(Testimony of George Poultney.)

anybody here who served me liquor on that particular night. (To Mr. Geis.) Well, Mr. Cabiale ushered me to a seat and [26] took my order, and subsequently I was served by a waiter. I gave my order for eats and drinks to Mr. Cabiale. (To Mr. Geis.) Yes, that is that bottle that I took with me to the Gianduja restaurant, with my label on it. This is the liquor that was served to me under my order, for which I paid and which I finally placed in this bottle.

On cross-examination the witness testified:

Prior to working as a prohibition enforcement officer I was in the army. I am not able to distinguish claret from grape juice by sight. I would have to taste it. I do not think I could judge as to the quantity of alcohol it contains except on a very strong drink. I would not have to rely as to the alcholic content of any liquor solely upon an analysis in all liquors. I would say in claret I would hesitate to state that it contained a great amount of alcohol, but in other liquors I do not think that I would hesitate to say. I came to the conclusion that it contained more than one-half of one per cent, by the taste of alcohol and the smell. On a good many things I think I could tell by the smell as to its alcoholic content, as to whether it contains more than one half of one per cent. I was there on the night of the 23d, the night of the raid. I procured a search warrant for the purpose of searching that place. I did not execute the search warrant personally, I procured it personally,

(Testimony of George Poultney.)

I rather think I delivered it to Mr. Wolff. I don't know what Mr. Wolff did before going to the place. Mr. Wolff was not with me. I am now speaking of Friday the 23d. The raid was conducted somewhere around 10:30, I should imagine. I went with Mr. Herbert and two ladies. I was not personally in possession of that search-warrant, I secured it from Judge Sawtelle. I think I gave it to Mr. Wolff. I made out this tag, that is my handwriting, I made it out that same evening. The waiter that served me with the claret, I do not see here. I say that Mr. Cabiale one of these defendants took my order, I am positive that I asked him for claret. I did not procure any liquor on the evening of the 22d other than those four glasses of claret. On the 22d I went there with another person and on the 23*th* I went there with three other persons. On the 22d I went there with a lady in no way at all connected with the enforcement office. The bottle that [27] I took away from the Gianduja Restaurant containing the drink that I procured there, I brought the next day personally to Mr. Love the Government chemist. Mr. Love did not return it; he returns us a written analysis of all liquor that he analyzes, and puts it in a pigeonhole and afterwards we get it when we need it. If I am not mistaken, I will say Mr. Love has initialed that label. I suppose he has some particular mark upon there that he could identify it with. On Thursday, at the time I accompanied this woman, I paid 25 cents a glass for the claret that

(Testimony of George Poultney.)

was bought. I tasted my own glass. On Friday evening, which was the following, I was accompanied by Mr. Herbert and two ladies. We procured four glasses of claret that evening. Nobody paid for that round of drinks. Someone said the place was raided and we had better get out, so the ladies that I was with seemed quite excited, they wanted to get out of the place, so we got out; they did not know that there was to be a raid on Gianduja's restaurant that night; they had no idea that anything was going to happen, they were not connected with the department in any way, manner, shape or form. They were just people we had picked up voluntarily, Mr. Herbert and myself. Some officers came along and they began to pick up glasses on different tables, and the waiters were running through the place saying, "Throw your wine away, the place is being raided, drink up your wine quick." So there was quite a bit of confusion, a good many people got up to leave, and with the crowd leaving I left also. That is the reason that I did not pay for the meal that I obtained and what I drank that night. Both food and drinks, probably, would run about $8 or $10. I had some cocktails also that night, I don't know what kind. I did not preserve them; the cocktails were taken off my table by one of the officers; I think it was Mr. Shurtleff, who seemed to come along there, and also Mr. Shaen, if I am not mistaken, took some from my table. Part was still in the glass. I was seated in the place quite a while before they

(Testimony of George Poultney.)

came in. They came to other tables before they came to mine as I was seated quite a ways from the door. Part of my wine might have been drunk; I drank part of the cocktail and part of the claret. With reference to the cocktails that I procured there I would say that it contained an alcoholic concoction of some kind. [28] I would say offhand that *if* contained vermouth. I have an idea what vermouth tastes like. I think it also contained jackass brandy. Jackasss brandy is an illicit distilled liquor, the tax on which has not been paid. Some refer to it as moonshine, I think jackass in the popular name for it. I have seen stills in operation in which the jackass brandy was being made. When I was served on Thursday night I said that I did not see any defendant here that served me. On Friday night that gentleman sitting away in the back there, the heavy set man, next to the man with the mustache served me. (Here the witness identified the man referred to as Mr. Frank Coppola.) Aside from Coppola, Cabiale and Donizello I do not recognize any of the other five defendants. On Thursday night I saw Mr. Cabiale and the gentleman behind him; on Friday night I saw Mr. Cabiale and the gentleman behind him and the other gentleman, Mr. Coppola.

On redirect examination the said witness testified;

The place is a good sized restaurant; I would not be able to give you the measurments; a good-sized dance hall there. I should say it is a larger room

(Testimony of George Poultney.)

that this. There is a dancing place there and music and singing. You might refer to it as a cabaret. I would say there are eight or nine waiters. The place seemed to be quite full of patrons—filled to its capacity, I think. I would say probably 150 people, in that neighborhood. I have not the least idea how late they keep open. The claret I drank on Thursday night and on Friday night seemed about the same.

Testimony of A. R. Shurtleff, for the Government.

A. R. SHURTLEFF, called for the United States and being first duly sworn, testified as follows:

I am one of the Government prohibition agents and was such in July of this year. I remember the occasion of going to what is known as the Gianduja place, that is where Mr. Cabiole carries on his place of business. On that evening I had occasion to take some liquor from that place. I took it from the table of the witness George Poultney. I took it down to a little counter where they had the cash register, at the entrance to the barroom, and gave it over to Mr. Kupser; I put it in a little flask that I took there for [29] that purpose. The flask I took out of our stock room in the Appraiser's Building. The flask with the tag on it is the flask and the liquor that I placed in it. That is my tag, in my handwriting. That was received by me on the evening of the raid, which I understand was on the evening of the 23d of July, Friday evening, in the place known as the

(Testimony of A. R. Shurtleff.)
Gianduja place, conducted by these defendants, or some of them.

Q. On that evening, Mr. Shurtleff, will you state to the jury and Court whether or not you observed liquor on the other tables, generally or promiscuously, in that place?

To this question counsel for the defendants then and there objected upon the ground that the same was incompetent and irrelevent and not binding upon the defendants. This objection was overruled by the Court, to which ruling of the court counsel for the defendants then and there duly excepted.

The WITNESS.—(Continuing.) As we entered the place, I was surprised at the amount of colored liquid or liquor that was on the different tables. As I proceeded in, there were two couples sitting at a table, two men and two women, and I told them who I was, what my business was there, and proceeded to take the wine off the table. I gathered up all I could possibly carry from two tables at a time, and took it back to the counter, where John Kupser was sitting, and told him to take care of it. After taking one back, I went right up to the dining-room and went to the table where George Poultney and party were sitting. The wine and the cocktails which they had at this table they had removed from the top of the table, and were hiding it underneath. I told them who I was, and that I wanted what they had in the glasses, and took the cocktails and the claret away from them and took it back to Mr. Kupser, and he put it in this flask.

(Testimony of A. R. Shurtleff.)

(To the Court.) It was mixed, the cocktails and wine were put into the flask. (To Mr. Tramutolo.) All four into that one flask, from Mr. Poultney's table. The other liquor that was taken from the other tables was put in a bottle that I picked up back of this counter and washed out, in that bottle sitting there; it was a black bottle. I would not say that I could identify that particular bottle, but I was particular in labeling this one bottle from Mr. Poultney's table. After the liquor [30] was gathered from the tables, there was a good deal of confusion, and the people were moving out and in, and I stepped down toward a door that is about in the center of the hall leading into the barroom, and I noticed quite a bit of liquor in there that the men in that particular part of the building had gathered up. They had some in a pitcher, and also had some in bottles.

Thereupon the said bottles were marked for identification, the large bottle as U. S. Exhibit 2 and the small bottle Exhibit 1.

On Cross-examination, the said witness testified:

I was in the place on Friday July 23d, the night of the raid. I got into the place thru the front entrance. The place is at Stockton and Union, on the corner, and there are several entrances. I went in from the east side, on the Stockton street side. John Kupser went in with me, I would not say that we were the only two who entered that door. I know John Kupser and I went in together. I went up to the couples at one table, I observed

(Testimony of A. R. Shurtleff.)

liquor there. I should say it was wine, from the color of it. I sampled it at the table, I should say it was claret wine. I gathered that up, and the next table to it, and took it back in glasses. That was not poured into the bottle which has just now been introduced, it was put into another bottle. (To the Court.) This here came from the table of Mr. Poultney and the parties sitting at the table.

That is my handwriting on the label which was attached by me that night. It was taken to the prohibition enforcement office and up to the chemist. It was under my custody at all times. I was riding right in the wagon with it all the time. The first table I stopped at was this table where these two couples were. I went to the second table and gathered up all I could possibly carry from the two tables, and carried it back to the counter. That was put in a big bottle that I picked up from behind the counter. That was taken along with me that same night. After that I went to Mr. Poultney's table where Mr. Herbert and Mr. Poultney and two ladies were sitting. It was to the rear, I should say just about the end of the platform where you go down into the dance hall. I imagine some of the liquor had been spilled, because they were trying to hide the cocktails and wine under the tablecloth. There were perhaps fifty people [31] in the place, of course, I did not get to see all of them, but they were doing a good business that night. I did not create considerable confusion when I went in. I spoke to several people, I told them who I was. I

(Testimony of A. R. Shurtleff.)
told them to go ahead and finish their dinner. I cannot say that I saw any particular waiter serving liquor. I do not know whether any defendant served that liquor on that particular occasion to that party.

On redirect examination the witness testified:

On that night I saw the defendant Donizello and the man next to him. I would not say that I saw Mr. Cabiale. I was too busy to pay much attention to all of these men, but I remember those two in particular. Mr. Donizello is the man that walked up to me at the time we entered the place. The cocktails and the claret in the bottle that has been introduced were taken up to the chemist the next morning, if I remember correctly.

Testimony of H. M. Kupser, for the Government.

H. M. KUPSER, called as a witness for the United States and having been first duly sworn, testified:

I am a prohibition agent and have been such during all of this year. I was present on the evening of the 23d of July of this year at the place known as the Gianduja place, where the defendants, here, conduct their business. During the raid that night of the Gianduja café and restaurant, I was instructed to take a position near the cash register, or where the checks were paid, and there I received the liquors which were taken from the various tables, and took charge of those. I will state in particular that the various liquors that were

(Testimony of H. M. Kupser.)

brought up, the liquors which were seized on the table occupied by Mr. Poultney and his friends that night, those liquors were brought to me by Agent Shurtleff and Agent Shaen, and the liquors seized from that particular table were put in a separate bottle. This bottle now shown me is the bottle containing the liquid that was taken from Agent Poultney's table. The other liquors, which were taken from the other tables, were put in other bottles, but the other liquors which were taken from the other parts of the premises, such as the bar, I had nothing to do with. I believe they were subsequently taken to the Government [32] chemist. I recognize the defendant Cabiale, sitting directly back of Mr. Tramutolo, and I also recognize the large gentleman with the mustache. I believe he was in charge of the bar in the saloon premises. I noticed as the various waiters would come up with their tags, they would have some sort of a tag and would produce it at the cashier's, where he registered it, and the amount was rung up according to what appeared on the tag. The tags were then put in the cash register. I got some of those tags on that evening. These are some of those tags which were in the bundle in the cash register. I did not put any marks on them, I put no identification marks on them. I believe they were turned over to Mr. Shaen; that is, after we arrived back at the Agent's office they were put in his desk.

Thereupon the United States Attorney offered

the said tags in evidence; the two offered read as follows:

"Gianduja Restaurant, Waiter No. 10, Check No. 24. Number of persons. 2 Cafe Royal $1. 1 Whiskey, 74 cents. 2 wine, 50 cents, $2.25. War tax, 10 cents. $2.35."

"Gianduja Restaurant, Waiter No. 10, Check No. 36. Short 25 cents. 2 Cafe Royal $1. 2 Whiskey $1.25. 1 wine 25. Total $2.50."

To the introduction of this evidence counsel for the defendant then and there objected upon the grounds that there was no means of identifying the said tags and that the same were not taken pursuant to a search-warrant.

The COURT.—You cannot raise that question here in the middle of the trial. There is a time and place to try that issue. You cannot try it here now.

Mr. TRAMUTOLO.—Here is our situation—

The COURT.—(Interrupting.) I do not care to hear about it from you now. I am quite familiar with the law, and have been quite lenient with defendants in enforcing it.

Mr. TRAMUTOLO.—We are trying a collateral matter here as to checks that were found there.

The COURT.—We are not trying any collateral matter. These men are charged with the sale of liquor. They say they did not sell the liquor there. In their cash register is found a check which on its face purports to be a check for [33] the sale of whiskey and the sale of wine. The defendants

(Testimony of H. M. Kupser.)

can make such explanation about that as they desire later on.

To this ruling of the Court counsel for the defendants then and there duly excepted.

On cross-examination, the said witness testified:

The liquor that was procured from Mr. Poultney's table was brought to me at the cash register. I poured it into the bottle; that tag was placed there by Mr. Shurtleff, in my presence. That was at the time that the liquid was poured into the bottle. The liquid was brought to me in glasses and then poured into that bottle by me. Mr. Shurtleff brought part of it and Mr. Shaen part. There were four glasses brought to me in all. The contents of the four glasses brought to me by Mr. Shurtleff and Mr. Shaen were poured into that bottle. I identify Mr. Cabiale as being there that Friday night. I believe that I recognize the little fellow; I am not certain, but I particularly recognize the gentleman with the mustache. As to the other defendants, I am not certain as to their identity. I was stationed by the cash register in the dining-room. The cash register is close to the door on the east entrance of the restaurant. I believe the gentleman sitting directly back of you was behind the cash register taking in money while I was standing there. I was there during the entire investigation. I believe we entered the place about ten thirty P. M. We were probably in there an hour or thereabouts. These checks which I have identified were found in the cash register. I do not

(Testimony of H. M. Kupser.)
know, of my own knowledge, that Mr. Shaen and Mr. Shurtleff brought liquor from Poultney's table. They told me they did. I did not see them get it at Poultney's table.

Testimony of W. D. Smith, for the Government.

W. D. SMITH, called as a witness for the United States and being first duly sworn, testified:

I am and was on July 23d last, a prohibition agent. I was present at the time on the 23d of July, when a raid was made on the Gianduja place. I entered the barroom on the Union Street side, followed by Thomas, Wolfe and Shaen. The bartender was at the end of the bar, right as we went in. That [34] gentleman in the middle there, with the moustache, the big man, was the bartender. I think he was standing there when I went in; as we came in he started toward the middle of the bar, and not knowing what he might have been going there to do, I thought he might try and dump some stuff, I went over the bar and stopped him, and on the drain board I picked up a pitcher, a porcelain pitcher about half full of wine; I handed that pitcher to Mr. Thomas; he came behind the bar, and I handed it to him. Just then one of the waiters came running out from the restaurant proper, and he had a glass in his hand, and seemed very much excited, saying something about revenue men raiding, something like that, so I went over and took a glass away from him and turned that over to Mr. Thomas; I believe that man was the

(Testimony of W. D. Smith.)

defendant Dante Forasiepi. Next I saw a man running right thru the door—I saw a man running at a pretty good speed, I didn't know what he was up to, so I left the other two men at the bar and followed him, and I lost track of him in the confusion; I did not know where he went to, so I went back to the restaurant, and then I went down in the basement and searched the basement and found nothing there. I cannot identify the man that ran, from any of these that are here. I saw the figure of a man going by the door, and I ran out to see who it was, but I did not see him. When I came back from the basement I went to the restaurant and they were moving the liquor in the restaurant up to the cash register. Kupser was there, I believe. I stayed there until they telephoned for the patrol wagon; the patrol wagon came, and, in the meantime, the men out in the bar had taken the stuff, the bottles, I don't remember how many, I think five or six bottles, and put it in a box, and by that time the bartender wanted to go upstairs and change his coat, so I went upstairs with him, while he changed his coat, and then came down and got into the wagon with the rest of them.

On cross-examination, the witness testified:

This was on Friday night, July 23d, around 10:30 or 10:25. Enforcement officers Wolfe and Thomas were with me. There are two doors to the barroom leading out to the sidewalk, one on the Union Street and one on the Stockton Street side. Wolfe stayed outside of the [35] bar and locked the

(Testimony of W. D. Smith.)

door. I jumped over the bar. Thomas did not jump over. I am absolutely sure of that. I don't know that anybody guarded the door on the corner of Union and Stockton Streets. I know that Mr. Wolfe locked the door. He locked both of them. I did not make a search of the back bar, I jumped over the bar and got this pitcher on the drainboard. I found this wine at the end of the bar as you go in from Union Street. I smelled what was in the pitcher. I did not taste it. I can tell wine by smell. I could tell you the difference between wine and whiskey and a soft drink smell. Prior to working as an enforcement officer I was in the United States Army. I had had no experience with tracing sales of liquor prior to joining the army. I saw Mr. Poultney that night. He was sitting at the rear end, pretty near the rear end, as I remember.

Testimony of Samuel Shaen, for the Government.

SAMUEL SHAEN, called as a witness for the United States and being first duly sworn, testified:

I am a prohibition and internal revenue officer and was such on July 23d last. I was present at the place known as Gianduja's place on Friday, July 23d of this year, at the time this raid was made. We entered the place, at least I entered the place, with three others on Union Street, and as we walked in we saw waiters with trays delivering liquor to the different tables, and we started after one of them, that is, Jordan and I, and when he

(Testimony of Samuel Shaen.)

found out that we were revenue officers he upset the tray and spilled the contents, and then we started in different directions. I went to a table that was occupied by two gentlemen and two ladies, and I found that they were drinking claret, I suppose it was—I know it was claret—and they were hiding it under the table when we came in there, and I took one glass away from one of the men sitting at the table, and took the glass of claret up to the front of the restaurant and placed it on the counter; a man named Kupser was in charge of that part of it. Then I went into the barroom and there were a couple of agents in there, and I went behind the counter, and examined some of the lockers with one of the agents, and took several bottles from behind the counter, from these lockers. That is one of the bottles that was taken out of the lockers at that time. We put this on top of the counter. We took it down to the Appraisers' Building [36] and put it into the room which we were occupying at that time, and subsequently it went to the chemist for analysis. We sealed these bottles up; put sealing wax on every bottle that we took. This bottle, vermouth, was one of the bottles we got from the lockers. We took it away that night to the Appraisers' Building and subsequently it was delivered to the Government chemist for analysis.

(Thereupon the bottles in question were marked 4 and 5 for identification.) Besides these two, there were six bottles, I think, altogether, that we took with us that night when we left. I recognize

(Testimony of Samuel Shaen.)

Donizello as having been there that night. He was serving at one of the tables as a waiter; and I took him and placed him in charge of one of the men at the outer door, that we had closed at that time. I asked him to go out there because he was under arrest. I saw him go to a table, I think, where these four people were. The reason I can identify him particularly is a little while after we got through in the bar he asked me if he could not go to some of the tables and collect some money from people he had served, and I said all right, and I watched him go to two different tables, and when he got through with those tables, he came back and said he would like to go down and change his clothes, and I said all right, and I took him to the head of the stairway leading into the basement, where the lockers were, I presume, and Mr. Estelle was down there with another man, and I waited a little while and he did not come back, and I went down and asked Estelle where the other man was, and he said he didn't see any other man; he had disappeared in the meantime; I don't know where he went to. This is the first time I have seen him since then. I am almost positive Peter Zurich is the man I went after who upset the tray.

On cross-examination, the witness testified:

The officers that entered the premises with me on the Union Street side were Mr. Jordan, Mr. Drew and Mr. Estelle. We entered on the Union Street side which takes you into the restaurant proper, right where the little boxes are. We went into

(Testimony of Samuel Shaen.)

the main dining-room at first. I saw Mr. George Poultney in there. I grabbed a glass of liquor from Mr. Herbert, one of the men sitting at Mr. [37] Poultney's table. I took it up to the counter where Mr. Kupser was standing and handed it to him to keep, to hold it for evidence. I did not see what Mr. Kupser did with the evidence. I then went into the bar. I stayed in the main dining-room just a few minutes; there was excitement among the guests; the people got up from the tables; there was not much else to do right there, and I went into the bar. I was not served with anything. I saw people being served, and, as I say, they asked me if they could not go and collect money for what they had served. I did not see this man serve the liquor (referring to the defendant Donizello). I found this bottle labeled 'Vermouth' behind one of those sliding glass doors behind the bar. I did not sample it; I don't think I even smelled it. I do not know who found the other stuff there, of my own knowledge; Thomas and I were searching behind there. Mr. Wolfe was in front of the counter. Smith was on the outside of the counter. He was not doing any searching at that time. I don't know whether he did any searching at all. I am only talking of what I know as to who was behind the bar. I think most of the stuff that was carted away was on the counter—there might have been one bottle found after I got through there, but at that time Wolfe was in front of the counter to see that it would not be

(Testimony of Samuel Shaen.)

taken away by anyone. I don't know who placed all of these bottles in a box. I went down with the box to the wagon. The box was not particularly in my custody; we were all there and left together and placed the stuff in the Custom-house. There were only four in the bar at that time. The other men only know what I found there by what I told them. They saw it taken away from there, because we went down in the patrol wagon with them. I think Thomas found three bottles before I got there. (To the Court.) I think there were six or seven altogether. I did not label the bottles myself. They were not labeled in my presence. I recognize those two particular bottles I found. I found that bottle of vermouth and I said to Thomas, made the remark, "Here is a bottle of vermouth"; and then I found that bottle. I know that bottle by that straw stuff around that maraschino bottle. [38]

On redirect examination, the said witness testified:

The liquor that is here in the bottles that I secured at the Gianduja place was taken into the Custom-house, into the room that I opened. I opened the door to let them bring it in. Subsequently it was taken out of there by some one and taken to the chemist for analysis. Who took them up I don't know.

On recross-examination the said witness testified:

I could not tell you positively how soon after this

(Testimony of Samuel Shaen.)

raid the bottles were taken to the chemist. I did not keep a record; the agent would bring in things —they would just bring them in and label them, and they would then go into a room that we had, another room altogether which we kept under lock and key. I am not the custodian of the property seized. There was only one key to the room; we had it in Mr. Considine's office. An agent, when he seizes any property at all for the evidence brings it down and labels it himself, and then he takes it, as a general rule, to the chemist himself, for analysis; the chemist then makes a report to our office in duplicate, of anything that is taken up to him, but there is no record kept by me or anybody else, except they get a report from the chemist. The man who makes the seizure keeps the record himself. I do not know, in the case of these particular bottles, who took them to the chemist. They were labeled by someone else, someone who was connected with the raid. The fact that I found those two particular bottles cuts no figure, because Thomas got some, and maybe somebody else got some, and one man attended to all of that, one of the men who was in the expedition. As far as labeling is concerned, one man does that part. It does not make any difference which one in the party does it, as long as it is done.

Testimony of William J. Jordan, for the Government

WILLIAM J. JORDAN, called as a witness for the United States, and being first duly sworn, testified:

I am a prohibition agent and have been such for all of this year. I was present at the raid that was made on the place known as the Gianduja place, where these defendants were found. That night, Mr. Shaen, Mr. Estelle, Howard Drew and I went into the Union Street entrance, and as we went in the door this gentleman [39] over here on the left, that one with the bushy hair, he was coming in with a tray of wine (referring to Attilio Porcellini). I went in and he passed in front of me, and he had a tray with him with six or eight glasses of wine on it. I stepped around, ahead of him, and asked him, "What have you got there?" and he asked me, "Who are you?" and I flashed my badge and told him who I was, and so he immediately took the tray and threw it up into the air, and so I grabbed him and brought him over and turned him over to Howard Drew. By "throwing it up in the air," I mean he spilled it before I had a chance to grab it, and he made the remark it was grape juice. So we went around the place and picked up some wine—I did not—some of the other men did—and Poultney and Herbert were sitting down to the table, and Shurtleff and Kupser went over and took some of their wine—Shurtleff, I mean; Kupser was over at the cashier's desk—and they brought the drinks over. Donizello was by

(Testimony of William J. Jordan.)

the cash register, and this man here with the mustache was in the bar, the big fellow. Forasiepi was serving wine around there, and he was just coming out of the saloon part of it, so somebody said to me, "You had better take care of him." He wanted to get his coat and wanted to collect some bills around there from different people at the tables; then finally he got his coat and we got into the wagon and took them down to the city prison, and he told me he had a wife and three or four children, and he did not want to go to jail that night, so I told him all right, he could go home, I did not want to worry his wife and children, and we could pick him up next day, which we did. At the end, just before we went out, the liquor was all together on the end of the bar; it was in a box, so Wolfe went and called the patrol wagon, and we took these gentlemen and put them in the patrol wagon.

The COURT.—Which ones?

A. The man on the end, this man with the mustache, this man here. There were four of them in the wagon.

Donizello was in the wagon that night, and the man with the mustache and the man on the end, and the other man I don't remember. This liquor that was procured or placed in bottles was put in a box and we took it down to the Custom-house. From that place it was taken by some one to the chemist. [40]

(Testimony of William J. Jordan.)

On cross-examination, the witness testified:

I did not make any test there. I did not see anybody else make a test. There is a door that fronts right on Stockton Street, which we will call the easterly door, and there is a corner door which enters the bar. I came in the door on the Union Street side that is not anywhere near the barroom. When I came into the place I saw Mr. Kupser up there by the cash register, behind this crescent-shaped counter, that is in the dining-room proper. Donizello was beside Kupser, he was not attired as a waiter. Mr. Shaen was not with me all the time. You see there were 300 or 400 people around there, and as soon as we got in the door I went after the waiter, and Mr. Shaen was not with me all of the time. The man that I grabbed was the man over at the end with the bushy hair. I did not take him in the police wagon, someone else took him. I do not know if Mr. Shaen saw him between that day and now. If I remember, Mr. Shaen went down to the police department with me. I can identify three of the defendants that went down to the station at that time; I cannot identify the fourth. I let the man with the mustache go home. He told me he had a wife and two or three children, and they would be worried if he did not come home, and I told him he could go and we would pick him up later. This other man, Porcellini, had a tray with 5 or 6 glasses on it, full of wine. I know wine, I can tell wine by the smell of it. I can pretty near tell it by sight when they knock it all

(Testimony of William J. Jordan.)

over you and you get it over your hand. I didn't have a chance to distinguish the color, but it was the color of wine. As soon as he saw my badge he threw it up and spilled it all over me, and then I hustled him along to the dance hall. Poultney and his party were sitting to the left, coming in from the Union Street entrance.

Testimony of Harry Z. Drew, for the Government.

HARRY Z. DREW, called as a witness for the United States and being first duly sworn, testified:

I am a United States Prohibition Agent and was last July. I was present at the time of the Gianduja raid. I was placed in charge of the Union Street entrance to the place, with instructions to let nobody out until I received [41] further orders from the Deputy Chief Agent, Mr. Jordan. I remained there, with two of the waiters in my custody, until the place had been searched; the two waiters were then turned over to Mr. Shaen to go down and change their clothes. I went in charge and took charge of a box containing six bottles of liquor, and removed it to the police patrol, where it was taken as far as the Hall of Justice, and from the Hall of Justice Agent Smith and myself carried the box containing six bottles of liquor down to the Appraisers Stores Building, and placed it in the storeroom set aside for that purpose. As to the raid, I don't know a great deal, excepting that I took charge of one waiter, who was struggling with Agent Jordan at the time, and I held

(Testimony of Harry Z. Drew.)

him there. They had a struggle over a glass of something that the waiter had in his hand. Agent Jordan called to me to come and take the man, and I took him out near the Union Street door and held him there. Another waiter was later on turned over to me. I can identify Porcellini and the second man from the wall. I would say that these bottles are the bottles that I saw that night in the box.

On cross-examination, the witness testified:

Four of us entered that Union Street door, that is the door that leads into the restaurant proper. I am positive of my identification of the heavy-set man as being the one I arrested that night. I held him there just inside the Union Street entrance. The man turned over to me by Jordan was Porcellini. I would not say for certain how long I was at that door; I would judge in the neighborhood of half an hour, a little more or less. I didn't observe whatever was found there until after it had been gathered and placed in the box. All I claim to know about it is that I saw the stuff in the box, and placed it in the box, but I did not see it gathered up. The corks were sealed, with the exception of one bottle. I did not see the bottles labeled. I do not know who took them to the chemist and I don't know who labeled them. I don't claim those labels are restricted to those bottles only. I did not accompany those waiters to the city prison. I rode down as far as the city prison on the patrol wagon, and when we arrived at the city prison Agent Smith

(Testimony of Harry Z. Drew.)

and I took charge of the box that contained the [42] bottles, and walked down to the Appraisers Store Building with it, and put them away. Agent Smith and I put the box in the room where the evidence is kept. Agent Smith had a key to the room. He accompanied us, as did also Agent Jordon. Practically all of the agents that could get on the patrol wagon were on it as far as the Hall of Justice. I could not see what Porcellini, the man whom I say was grabbed by Mr. Jordan, was carrying because just at the time I had not been able to quiet some of the people down yet who attempted to get out of the place; my instructions had been to allow nobody to leave until I received orders to that effect. Some of the patrons became very much excited. I guess the majority of the people there made a rush for the door I was standing in front of, and I had quite a little time getting them back and in quieting them down and explaining to them that they would not be held in any way. Several of them were under the influence of liquor, and it took quite a little talk to them to get them to go back; in fact, I had to make a display of force to get them to go back, in order to protect myself. The force I used was a Colt's revolver. I allowed them to get within three feet of me, and some of them looked as though they might go too far unless I used means to stop them. I was alone at the time at the door. I did not see what Porcellini was carrying at the time. At the time I went to the assistance of Mr. Jordan, I did grab that man,

(Testimony of Harry Z. Drew.)

as you say, and pulled him out in the entry way. Agent Jordan told me to handcuff him. At the time I did not have handcuffs with me. He made the remark not to mess him up, and I told him to be quiet and nothing would happen to him and he would not be messed up. I did not see Coppola with anything in his possession.

Testimony of A. L. Estelle, for the Government.

A. L. ESTELLE, called as a witness for the United States and having been duly sworn, testified:

I am, and have been for a year or so, a prohibition agent. Two years prior to that I was an army officer. I accompanied the raiding party to the Giand*jua* place on the 23d of July of this year. I entered the place, accompanied by three other agents, Mr. Jordan, Mr. Shaen and Mr. Drew. We entered from the Union Street entrance. I was designated by Mr. Jordan, who was the [43] head of our party, to take charge of any persons that might be arrested and turned over to me. I stopped just inside the entrance, opposite the checking-stand. Two prisoners, two waiters, that is, men in waiter's clothing, were turned over to me to keep there while the raid was going on. I kept those waiters there until the raid was finished, and I turned them over to Mr. Drew. I was put in charge of the prisoners, and I took them to the city hall and booked them, accompanied by Agent Wolfe. That was the part that I played in it.

(Testimony of A. L. Estelle.)

When I went down into the barroom, there were six bottles in a box setting on top of the bar, near the end of the bar; I saw them there. Mr. Wolfe was standing there, with a search warrant; he was standing near the bottles. They were turned over to two of our agents, Mr. Smith and Mr. Drew. I do not know of my own knowledge where the bottles were taken. The four standing on Mr. Geis' table and the two on the clerk's table are the same bottles. Yesterday, at your direction, I went to Mr. Copestake, who had charge of them up in your office, and asked for them, in order that I might take them to our chemist for analysis. They were turned over to me and I then carried them down and turned them over to the chemist, Mr. Love. At that time five of them were sealed and one was not.

On cross-examination, the said witness testified:

Yesterday I took the bottles to the chemist, two of which are introduced in evidence and are on the clerk's desk, and four that are on his table. As far as I know that was the first time they had been taken to the chemist. I don't know of my own knowledge who brought them up to Mr. Copestake. I did not place any mark of identification on those bottles when I took them from Mr. Copestake. I know by their looks, and the lables on the bottles, that they are the same. I don't know how many people were in this restaurant on the night of July 23d. In the portion next to me, where they were dancing, I

(Testimony of George R. Poultney.)
would estimate it at probably 100 people. I would say, altogether, that I stayed at the Union Street entrance door, thirty minutes.

Testimony of George R. Poultney, for the Government (Recalled).

GEORGE R. POULTNEY, recalled for the United States, testified:

Referring to the two bottles sitting on the clerk's desk and the [44] four bottles before me, I brought those bottles in a box to this office and turned them over to Mr. Hardie, to the United States Attorney's office. I got them from the Appraisers Building in the room that is kept for the liquor. They were in the same condition when I turned them over to Mr. Hardie as they were when I took them out of the appraisers building. The small bottle, that the tag is in my handwriting, I took that to Mr. Love, the chemist. The contents are the same as when I took it from the Gianduja place.

Testimony of A. M. Hardie, for the Government.

A. M. HARDIE, called for the United States and having been first duly sworn, testified:

I received the four bottles that are standing on the table here and the two bottles on the clerk's desk from Mr. Poultney. At that time I had the key to our liquor safe and I placed them in the safe. They are now in the same condition as far as the contents are concerned, as they were when Mr. Poultney gave

(Testimony of A. M. Hardie.)

them to me. The contents of the bottles at the present time are the same contents as when I got them from Mr. Poultney.

Testimony of R. F. Love, for the Government.

R. F. LOVE, called for the United States and having been first duly sworn, testified:

I am employed by the Government of the United States as a chemist. I have seen United States Exhibit No. 4 for identification. At the time that bottle was handed to me it was sealed. I analyzed it; I determined the alcoholic content of it. It analyzed 33.1 per cent alcohol by volume. I received the bottle from Mr. Estelle. I analyzed United States Exhibit 5 for identification, and the result was alcohol 2.55 per cent by volume. I received from Mr. Estelle a bottle referred to as being in the box. I analyzed it, with the result, alcohol 17.8 per cent by volume. Another bottle, heretofore testified to, I analyzed with the result, alcohol, 48.6 per cent by volume. (To the Court: I think that one contained whiskey). Another bottle testified to as being in the box was handed to me by Mr. Estelle and I made a chemical analysis of it, with the result, alcohol 45.25 per cent by volume. I think that was brandy, but I am [45] not sure. Another bottles testified to as having been in the box, I made a chemical analysis of, with the result, alcohol 45.25 per cent by volume. (To the Court: That would be about 90 proof).

(Testimony of R. F. Love.)

Thereupon the prosecution offered the said exhibits and bottles in evidence, to which counsel for the defendants then and there objected upon the grounds that the witness Poultney did not see any of the said property found and that there was no testimony that the said witness saw the same in the box. The Court overruled the said objection. To which ruling counsel for the defendants duly reserved an exception.

The WITNESS.—(Continuing.) I made a chemical analysis of United States Exhibit No. 2 for identification, testified by Mr. Shurtleff as having been handed to me for analysis, with the result, 10.3 per cent alcohol by volume. In my judgment it is claret wine. I made a chemical analysis of United States Exhibit No. 1 for identification, with the result that I find it contains 9.74 per cent alcohol by volume. In my best judgment the contents of the various bottles are fit for beverage purposes.

Thereupon counsel for the United States offered the two last mentioned bottles in evidence, to which counsel for the defendants made the same objection stated to the rest offered. The court overruled the said objection, to which ruling of the Court counsel for the defendants then and there duly excepted.

On Cross-examination, the said witness testified:

I did not drink any of the contents. I did taste one or two. I think I tasted the one labeled Vermouth and the one labeled Marascino. I have never seen any of that vermouth before. I received the

(Testimony of R. F. Love.))

two bottles last identified by me on July 26th. I know, as a matter of fact, that grape juice in a bottle will turn to wine. I don't know whether Marascino is used for beverage purposes. I placed marks of identification upon the exhibits furnished to me for analysis so that by the labeling or by the wording I identify the contents. In making my analysis of United States Exhibit 2 I would say it was all wine. (To the Court: I analyzed it only to ascertain its alcoholic content). I would say that these two articles, Exhibit 1 and Exhibit 2 are wine. [46] Grape juice exposed to the air will acquire the same alcoholic content as wine when it is originally made, in time.

On redirect examination, the said witness testified:

For grape juice of the proper standard to turn into wine, containing the alcoholic content of Exhibit 1 and 2, might occur within three or four days. It is not absolutely essential to that process that it be exposed to the air. Some substance, like yeast, is apt to start fermentation. Grape juice kept in a bottle without any supplement to it does not turn. If the air can get in it will ferment. I don't think the staves of a new barrel are porous enough to allow enough air to get in to cause fermentation. The slightest air that may get into that barrel will probably turn the barrel, or its contents, into wine.

Testimony of A. R. Shurtleff, for the Government (Recalled).

A. R. SHURTLEFF, recalled for the United States, testified:

At the time I secured Government's Exhibit No. 1 I sealed the bottle and kept it sealed until I gave it to the chemist. I suppose it would be exposed two or three minutes that night.

THEREUPON the Government rested its case.

Thereupon counsel for the defendants moved the Court for a directed verdict, upon which motion the following proceedings were had:

Mr. TRAMUTOLO.—If your Honor please, I desire to make a motion for a directed verdict as to a number of these defendants. Many of them have been assembled here just because they happened to be there that night. Why they did not bring the cooks and utensils along is something I don't know. But there are a few defendants in this case that have not been identified as having been there that night. I desire to recall the testimony of the various officers as to the people who were identified as having been there on the particular night of July 23d when this raid was made.

There has been no identification of this particular man, Gabalio. The sole testimony of Officer Poulney was that he saw Donizello there, and that he believed that Peter Gabalio was there; and by saying he believed—I don't want to misconstrue what the evidence really was, and any misstatement [47] I might make with reference to the defendants

who have not been properly identified I do not do it wilfully, I am doing it from my notes that I made and from my memory. But assuming that all of these defendants were there, if your Honor please, the Government must still prove, before it could expect us to overcome its case, it is not a *prima facie* case, the mere presence of an employee at a place where liquor is found, any more than if they arrested every individual who was in that place as aiding and abetting the commission of a crime, because the people who procured that liquor, if it was procured from these defendants, are just as guilty.

The COURT.—Maybe they are.

Mr. TRAMUTOLO.—I anticipated your Honor's point of view, and I do not argue that because certain ones are eliminated, and some are made "goats" of, if I can use that term, but there must be something more to connect some of these people who have been merely haphazardly identified as having been there with a direct charge in this complaint or this information.

There are eleven counts in this information; nine of them are that claret was sold to Mr. Poultney, who makes the affidavit which the Government relies on to substantiate the charge in the information, because the information reads, that the affidavit is hereto attached—you have seen so many of them it is not necessary for me to go into the point. The Government relies upon that affidavit. If you will look over that affidavit, the affiant makes

twelve specific charges of sales. If there is one order placed by Mr. Poultney—which is true, he placed one order Thursday night, and one order Friday night, the service to those four individuals at that time does not constitute four separate violations, it constitutes one transaction, for which there has been no proof that any money was paid. In addition to the place being conducted as a common nuisance, we are obliged to meet the charge of a direct sale to Poultney. There are eleven counts in the information, and still the affiant has made twelve separate statements in his affidavit, or that he made twelve separate buys. Now, either it was charitable on the part of Mr. Geis or of Mr. Hardie, because they only placed eleven counts. There is an inconsistency between the [48] averments in the information and the proof. The affidavit was made by Mr. Poultney in this particular case. Who did Poultney say served him with this liquor? If my memory served me right, if my hand did not write something that my mind did not want put down, he testified that on Thursday night he saw Cabiale there, the gentleman who is seated right behind here, and the gentleman behind him, Mr. Donizello, and that he believed that Gabalio was there, and that Mr. Donizello took his order, and that the service was made by Coppola, the gentleman sitting the last one over there. The identity of a number of these defendants—and the Government should be frank enough to state to this Court and to this jury, and particularly to this Court,

those who it would compel to take the stand and state that sales were made. Mr. Poultney did not pay any money. We are meeting the charge of selling.

The COURT.—That does not affect the sale. Many a man sells his property and never gets any money for it.

Mr. TRAMUTOLO.—It is apparent that Congress had in mind the transaction of a sale.

The COURT.—You know what a sale is. A sale does not involve payment.

Mr. TRAMUTOLO.—But Congress must have had that in mind, because it says, "Whoever shall furnish."

The COURT.—There is no necessity of arguing that. You are too good a lawyer to know that a sale does not require payment. He may owe it to him yet, he probably does.

Mr. TRAMUTOLO.—But we will wait a long time to collect it, your Honor.

The COURT.—If you undertake to collect, he might well defend the declaration that it was an unlawful transaction. I will let the whole matter go to the jury. Motion denied.

Mr. TRAMUTOLO.—I will reserve an exception.

The COURT.—We will meet to-morrow at ten o'clock, gentlemen.

Mr. TRAMUTOLO.—Before adjourning, may I make an objection which I intended to make at this time? At the time the books were introduced, on

the additional ground that they are not the best evidence. [49]

The COURT.—I don't like *post mortem* objections, but you can make it.

Mr. TRAMUTOLO.—It is not the best evidence.

The COURT.—No, the best evidence would probably be the man who would come along and say, "I saw him sell the whiskey."

Mr. TRAMUTOLO.—Then I will reserve an exception.

The COURT.—I rather agree with your idea, though, that they cannot split up one sale into twelve different transactions.

Mr. TRAMUTOLO.—There were only two sales made.

The COURT.—That is enough to support the proposition. The case will go to the jury under proper instructions. I don't think the Government makes anything by undertaking to split up one transaction into fifty, for instance.

Mr. HARDIE.—There are eleven counts, two counts charging maintaining a nuisance, five counts charging sales, two counts charging possession, and two counts charging furnishing. There are not twelve sales alleged, there are five sales alleged.

Testimony of W. D. Smith, for Defendants (Recalled).

W. D. SMITH, recalled by the defendants, testified:

I was in court when Mr. Shaen testified yester-

(Testimony of W. D. Smith.)

day. I heard his testimony as to having found the maraschino and the bottle of vermouth. I could not say which of the liquors that had been introduced by the Government were found by me. I was not there when the bottles were found. Somebody filled the bottles with the stuff in the pitcher, I did not see it done. I did not see the sealing. I do not know who did it.

Testimony of Louis Cabiale, for Defendants.

LOUIS CABIALE, called as a witness on behalf of the defendants and having been first duly sworn, testified:

I reside on the second floor of the premises at 1529 Stockton Street. The upstairs is used for a hotel and the lower floor is a restaurant. I am one of the proprietors of the Gianduja Restaurant. I have been in business there about five years. I am a married man of family. I have a record here that shows all the checks. The government wants that, on account of the war [50] tax. And it shows everything from some time in December to now; there are all the checks that have been used on my premises, so that we can check it up and see if I had that check on the 23d of July. The cash register has two rollers, one is out of order, and we never use it, because it does not work, it is out of order. Every night I check up all the waiters. Whenever I find any mistakes, I put those checks in that drawer, which we do not use for anything else. I have the record right here. Waiter

(Testimony of Louis Cabiale.)

No. 10 on July 22d was an extra waiter by the name of Harris. He did not have serial number 34. Seven waiters worked on the night of July 23d. None of these seven waiters have any base number 34. I have kept this particular record since some time in December 1919 up to last night. No waiter with serial number 34 worked in my premises since December 15, 1919. I have to keep the record; the Government wants you to keep a record of all the serial numbers of checks, on account of the war tax, that we pay in a cabaret; any place where there is any sort of entertainment we have to pay a war tax, and we have to keep a record of all the tags. I have my checks for the months of July and June, also, I have the tags right here. The checks here represent June and July. The receipts are inside showing that I paid the tax upon the checks totaled.

Mr. TRAMUTOLO.—I offer these as Defendants' Exhibit "A."

Mr. GEIS.—What is the purpose of introducing the other ones in June?

Mr. TRAMUTOLO.—Your contention is there is a public nuisance conducted there. We have records which could not be changed; the defendants are obliged to keep them, because the Government is entitled to a tax, and I think they should go to the jury for the purpose of showing that sales of liquor have not been promiscuously made. The Government has brought here some isolated checks, and I think that we are entitled to let the jury see

(Testimony of Louis Cabiale.)

these tags; they show the volume of business that is being done, and certainly they could be checked, if they desired to do so, by going through the voluminous number of checks, to see whether sales were promiscuously made.

The COURT.—I did not understand that there was an objection made to it. [51]

Mr. GEIS.—I make an exception to it on the ground that they are immaterial, irrelevant and incompetent in so far as applying to any other date except the date of July 22d and July 23d. It would probably take the Court and jury two weeks to run through this, and it is needlessly encumbering the record.

Mr. TRAMUTOLO.—You can go through them and check them and see if the Government has been paid.

The COURT.—The objection will be sustained. The witness may make any explanation he desires of these checks, but the introduction of the other checks is denied.

Mr. TRAMUTOLO.—I will accept that modification and not urge that the others go in.

Q. Did you look over the checks for the month of July, particularly the dates of the 23d and the 22d of July—did you look over those checks?

A. Yes.

Q. Is there anything on there showing or indicating the sale of intoxicating liquor?

Mr. GEIS.—We object to that on the ground it is not the best evidence.

(Testimony of Louis Cabiale.)

The COURT.—The objection will be sustained. It is apparent that if the defendant was violating the law that he would not be making a record of it which he must submit to a Government officer.

Mr. TRAMUTOLO.—Your Honor, it is a question of whether this man was deceiving the Government—

The COURT.—That is not the question we are trying. His own record, made out by him, could not be admissible.

Mr. TRAMUTOLO.—It is not made out by the defendant himself, but by the waiters.

The COURT.—Or by waiters who, if violating the law, would be just as guilty as he. You cannot disprove this charge by showing that no record has been made of it. He has an explanation of that check, he has said it might have been there, but you cannot show that liquor has not been sold there by showing that no record has been made there of sales of liquor.

Mr. TRAMUTOLO.—We note an exception. [52]

The WITNESS.—(Continuing.) I know Mr. Poultney. I have seen him several times with different officers that I know. I know several prohibition officers. I saw Mr. Poultney in my place of business on the night of Thursday, July 22d. I heard his testimony. Mr. Poultney came in and asked me to—he said he didn't know what to eat, and I said, "I will fix your dinner all right," and I took him to a table and sat him down in a private

(Testimony of Louis Cabiale.)

room, and I went into the kitchen and ordered a dinner. I did not serve him with any liquor. I did not order the waiter who waited on him to serve him any liquor. I do not know whether he was served with liquor that night. I don't remember who waited on him. The regular waiter that waited on the private rooms was gone at the time. Coppola is the regular waiter. He was not there that night. I was not present Friday night, the night of the raid. In the daytime I went across the bay and at night I went to the moving picture. We have French vermouth and Italian vermouth, which has been put up by a firm here known as nonalcoholic beverage, and we have sold it for nonbeverage purposes, because the label says it contains not more than 1/10 of 1 per cent of alcohol. Neither I nor anyone, to my knowledge, added any ingredients to increase the alcoholic content of that. I have other bottles of this kind, the same liquid. I brought one into court. The Government's Exhibit 4 for identification is maraschino. It is a sort of extract that we use for flavoring sabajon and some of the desserts that we make. Sabajon is made with eggs, stacked up with ice, and we put just a couple of drops in there to flavor it. It is not sold in my place for beverage purposes. (To the Court: The kitchen is about 25 feet from the bar.) I do not know of my own knowledge whether any sales of liquor were made in my premises by my employees on the nights of July 22d and July 23d. I knew Poultney prior to July 22d and knew

(Testimony of Louis Cabiale.)

what his occupation was. I have many times had trouble with patrons coming into my place with liquor. I have stopped dinner for that several times. I could produce the waiter that could testify to that. People have come in there and put wine or liquor right on the table. Of course, I could not go there and stop it, because I am not an officer, but I have gone to them and told them to get the liquor away, and if [53] they did not do it I would stop dinner, and I did it many a time. After their eating soup or salad I have stopped their dinner, and some of them I didn't even want to collect their checks. I said, "You don't pay anything, go out." Some objected to paying, saying that they had not finished the dinner, and that they wouldn't pay for the dinner, and I said, "Don't pay for the dinner, go out of my place." Some brought it in in their pocket; I don't know what they brought in; if they kept it in their pocket I could not go and search them. In fact, I am sure they brought it not only to my restaurant, but other restaurants. I know it by the fact that every morning, if you would go to any restaurant, you would find some empty bottles under the tables, in every place in town. I have been at that restaurant five years. My lease has about six years to run. I have been endeavoring to dispose of my place but I have been unable to find a purchaser. I pay $510 a month rent. Since the trial of this case I have made an investigation with reference

(Testimony of Louis Cabiale.)

to the grape juice that I have bought, as to its turning into wine.

I asked some experts about that question, if it was possible that in a short time the grape juice would turn into wine. So I was told that the grape juice would not only exposed to air, but sometimes being in an average temperature room like this room, here, it can turn into wine. So I have taken it all away from my premises. I have put some into vinegar barrels to make some vinegar out of it. I know that from now on that they have a new process of keeping grape juice, and I hope in the future I will be able to get grape juice without running the risk of its turning into wine. But so far as the last four or five months has been concerned, it has been very difficult to keep it. In fact, in all the new barrels that they put grape juice in they have to put some paraffine in, because they have found out that the pore, itself, that is, the wood, the air goes through it, and the grape juice turns into wine—only from the air that comes into it. They have proved that, and you can ask any dealer in grape juice, and they are putting some paraffine in every barrel. The other owners of the premises are Donizelli and Majori; the latter is in Italy. [54]

On cross-examination, the witness testified: I never met Mr. Poultney, but I saw him with some prohibition officers in this court. I came to court several times on cases. I did not come here to see who the prohibition officers were because I

(Testimony of Louis Cabiale.)

know them pretty near all. I know all the agents that have been with the revenue office for a long time. I used to go, years ago, to the revenue office to purchase stamps for wine and pay the war tax. In fact, I have known Jordan for years and I have known Shaen for years. I saw Poultney in court with some of the revenue officers that I know. I don't remember what other prohibition officers I saw him with. This book before me shows that on July 22d and July 23d there was no check of that serial number that was found in the cash register. This column of figures represents the serial number on which they began work. On July 21 waiter No 1 begins with serial number 274, and so on. This number here on the left-hand margin is the number of the waiter. On the 22d we had a waiter No. 10. On the 23d I had only seven waiters. I remember Mr. Poultney coming into my place on the 22d with a lady. He told me to order dinner for him. Generally I do not take orders but the waiter takes them. He told me to fix up a dinner for him, so I did. He did not say what I should order for him, or anything like that, so I started in ordering for him. He gave no specific order, except a general order that he wanted dinner. I went into the kitchen and ordered some salad and some meat and some pastry; I don't remember exactly what I ordered; I remember it was a combination salad and some meat. I gave the order to the waiter. I did not write it out. I told the waiter to write it out. I did not go back to

(Testimony of Louis Cabiale.)

the table at all. I have no checks which the result of the meal. If he ate in the public dining-room I would have the check, because we keep all the checks of the dining-room for the war tax, but in boxes they are not subject to the war tax, so we just throw them away. We had no liquor on the premises. We have grape juice, and apple cider, and Manhattan and Martini cocktails, vermouth—all this stuff that they put up now, nonalcoholic drinks. We serve grape juice from the bar in a pitcher. We do not serve any beverage from any other place in the building. [55]

Testimony of Frank Coppola, for Defendants.

FRANK COPPOLA, called as a witness on behalf of the defendants and having been first duly sworn, testified:

I am the defendant mentioned in the information as Colai. I have been employed nearly eight years at the Gianduja Restaurant. I am a waiter. On Thursday, July 22d, I quit about half-past seven or eight o'clock. I did not serve liquor to Mr. Poultney or any other person in the restaurant. I work on the Union Street entrance.

On cross-examination, the witness testified:

I did not serve Mr. Poultney with anything. I was there the night of the raid. I am not the waiter that tipped over whatever I had on my tray at the time. I never saw Mr. Poultney at all.

Testimony of Peter Zurich, for Defendants.

PETER ZURICH, called as a witness on behalf of the defendants and having been first duly sworn, testified:

I have been working as a waiter at the Gianduja Restaurant about three months. I *was the* night of July 23d, the night of the raid. I did not serve any liquor to Mr. Poultney, or to any other revenue officers that night. I did not have any liquor in my possession, carrying it on a tray. No tray was knocked out of my hand.

On cross-examination, the said witness testified:

I start in about five and I work until about 12 or 1. Sometimes I go home early. The restaurant is open in the morning, I think either 11 or 12 o'clock. On that night I waited on the people if they sat at my table. I served grape juice. I served whatever was in the pitcher, for that they charged 25 cents and during the cabaret 50 cents. By 'cabaret' I mean while the girls were dancing for the amusement of the patrons.

On redirect examination, the said witness testified:

The owners do not employ dancing people. The people dance. There are a couple of musicians and a singer, I think.

On recross-examination, the said witness testified:

Sometimes they have a man or woman singing. There is one piano and one banjo, and a fellow that plays a xylophone; about three musicians. [56]

Testimony of Dante Forasiepi, for Defendants.

DANTE FORASIEPI, called as a witness on behalf of the defendants and having been first duly sworn, testified:

I am a waiter at the Gianduja Restaurant and have been working there three years. I'm an Italian by nationality. I was present on the night of July 23d, the night of the raid. I saw Mr. Poultney that night. I did not serve him with any liquor. I did not have any liquor in my possession that night, never; not before or after.

On cross-examination, the witness testified:

I was there during all the evening of July 23d, up till the time the raid was made. I served the patrons that night with the beverage that was in the pitcher behind the bar. I made a charge of 25 cents a glass. When the dance was in progress the beverage that was in the pitcher was 50 cents. The dancing usually began about half-past eight or thereabouts. I do not know precisely the exact hour; it depended on the crowd that was there. I am the man that the prohibition agents allowed to go home that night. I simply was found with that empty glass in my possession with nonalcoholic beverage in it. On that evening I did not go into some portion of that building and declare to the persons present that there were revenue officers there. I didn't say anything, because they didn't allow me to even get out—they would not even allow me to go and collect money. One of these, because I was glancing over the glass door, just hit

(Testimony of Dante Forasiepi.)

me over the shoulder, and I was sore for two days. I was so confused that I did not say anything. They did not give me a chance even to leave. I said nothing to nobody.

Testimony of Peter Gabalio, for Defendants.

PETER GABALIO, called as a witness on behalf of the defendants and having been first duly sworn, testified:

I have been employed in the Gianduja Restaurant over a year. I am a floor-walker, seating the people down. I was in the place the night of July 23d. I was on my way out when they came in. I did not see the raid. I never served any liquor there in the restaurant at all. I just seat the people. I was in the restaurant Thursday night, July 22d. I didn't see Mr. Poultney at all. I have had difficulty many times with patrons bringing liquor into the restaurant. Mr. Donizello is in charge of the cash register. Frank [57] Coppola works on the Union Street side; he does not work in the main dining-room at all and has not worked there since I became floor manager. The dance hall has been in the Gianduja Restaurant about a year and a half, and we have had an orchestra and a singer there for about the same time.

On Cross-examination, the said witness testified:

On that evening I was there until about half past ten. I went there at five o'clock. I was on my way out when the people was coming in, so I didn't stop. I never serve the patrons, I just seat them down,

(Testimony of Peter Gabalio.)

that is all. I never take any orders. I simply send a waiter to them. I know that they always serve some grape juice out of the pitcher from the bar. We had it there always. We charge 25 cents a glass. We charge 50 cents for the cocktails. The mixture that I call cocktails was served every night.

Testimony of Andrew Donizello, for Defendants.

ANDREW DONIZELLO called as a witness on behalf of the defendants, and having been first duly sworn, testified:

I have lived in the city and county of San Francisco 27 or 28 years. I am a married man with three children. I am one of the owners of the Gianduja Restaurant. I was in the restaurant Friday evening, July 23d. I was dressed like I am now. Never in my life did I wear a waiter's suit. I was taking care of the cash register. Mr. Kupser, the prohibition enforcement officer was by me by the cash register all evening. I saw the checks that were taken out of the cash register. I handed them to Mr. Kupser, I handed him several checks. I believe there were 21 or 22 checks there. It is a National Cash Register, double rollers—two drawers, A and B. The tags were in the B drawer. No. 10 waiter with serial number 36 or 34 did not work that night, and waiter No. 10 did not work July 22d. These checks were there a long time, because there are mistakes even on the part of the Government, the revenue, that we have to pay; sometimes there is a mistake of them, or a mistake in the house, where

(Testimony of Andrew Donizello.)

the waiter don't charge right, and we put them away and correct them with the waiter when he comes back the next day. On Sunday and Saturday we do more than twice as much business as other times, and we have waiters come in, extra men, and they [58] do not come back, and we keep the checks. If there is anything wrong, when the Government comes up, we have to have the checks, so as to explain by the checks. These checks we have a long time, and that is where we keep them, in the drawer that we do not use. This check don't belong to this year, it might be a year old, I don't know how old it is. I am positive it is not a check that could have been used on July 22d or 23d because I can tell by the number, by the way it runs. I think I have been connected with the Gianduja Restaurant about five years. I have been trying to dispose of the place for several months but we have no buyers. I never served any liquor during five years. I did not authorize any of my employees to serve any liquor to Mr. Poultney or to any other individual. I am on the cash register and taking money in. I know some waiters have come to me and said that some of their patrons there have got a bottle on the table, and sometimes I am busy with the cash and have not time, and I call my man and tell him to go over there and see if they have got any liquor, and if they have, to take the liquor away, because we are not allowed to keep it. Sometimes I go myself, if I can get time, but it is a long ways, sometimes, from the cash register, and sometimes I can't do it; but

(Testimony of Andrew Donizello.)

if I can't do it I have the waiter go to the table and ask them to take the liquor away. Sometimes we will find in the morning empty bottles. About a week ago I found a flask about half full of sherry wine under the table. It was by the end of the table, and when the man swept in the morning, like you would do here, that is what he found, he said, and some other times we have found other bottles with some other stuff in; many times we have trouble in that way; we do not want them to bring it in.

On cross-examination, the said witness testified:

As proprietor I have supervision of the service that is made to patrons. When I have time I go through the dining-room and various places to see that patrons are served. I know what patrons receive by way of service in my restaurant. Whatever may be served is served with my knowledge and authority. I can't remember the day that the check, that was handed to me by Mr. Tramutolo, was made out, because [59] it is an old check. I can't tell you the exact date. I could not say how old it is because we have got numbers since then; the book will tell; we can find the serial number and the number of the waiter. I could not estimate the date.

Testimony of G. Bertolotti, for Defendants.

G. BERTOLOTTI, called as a witness on behalf of the defendants and having been first duly sworn, testified:

I have lived in San Francisco about ten years and have worked at the Gianduja Restaurant about

(Testimony of G. Bertolotti.)

four months. I was there the night of July 23d, when the place was raided. I was outside of the counter. I was serving as a waiter. The bottle shown me contains maraschino. It is used in the kitchen in order to flavor sabajon. I saw that bottle there that night. It is nonalcoholic and it is on the market and sold in every place. I never saw the four bottles. We just had a pitcher full of grape juice. We did not have any brandy behind the bar, or any whiskey. We did not have any wine; I had grape juice and these two bottles. The grape juice was in the pitcher on the bar inside. On the night of the raid I did not serve any wine to any body, nor did I serve it on Thursday night, July 22d. These Manhattans or Martinis are not made of alcohol. The liquor served to patrons on the evenings of July 22d and 23d was nonalcoholic.

Testimony of Attilio Porcellini, for Defendants.

ATTILIO PORCELLINI, called as a witness for the defendants and having been first duly sworn, testified:

I have been employed at the Gianduja Restaurant for three and one-half months. I was there the night of July 23d. I was seized by three or four officers that night. When I was seized I had three or four glasses, one of Bevo Beer, one of lemonade, and one of grape juice, and I don't remember the other. I did not throw the contents of that tray away purposely. Someone stopped me, and they caused me to spill the tray. At the

(Testimony of Attilio Porcellini.)

time there were about 150 people in the restaurant. Three or four officers seized me. I did not have any wine on that tray, as testified to by Agent Jordan. [60]

On cross-examination, the said witness testified:

My position that night was that of a waiter. When beverages of any kind were served I collected and brought it to the cash register. It goes into the till of the proprietors. When I came in with the tray nobody spoke to me; they got hold of me and grabbed me and took me away. I don't know Mr. Jordan, but three or four of them grabbed me all at once. I had the tray in this fashion, and they came in, three or four, and one got hold of me by the arm and he said, "You are under arrest," and by doing that the tray upset and the glasses fell. I have never been arrested before, this is the first time.

Testimony of Guido Battaglia, for Defendants.

GUIDO BATTAGLIA, called as a witness on behalf of the defendants, and having been first duly sworn, testified:

I am assistant cashier in the Banca Popolare Fugazi. I have known the defendant Cabiale for about five years. I always know him for a good man, good morality, an honest man. I know Mr. Donizello and Mr. Gabalio and the defendant Forasiepi. I know all of them as good men, honest at all times; I never heard anything against them.

(Testimony of Guido Battaglia.)

On cross-examination, the said witness testified:

I heard about them a month ago, when they were arrested in the case, but before that I never heard anything against them. I never heard anything against their reputation. They keep a commercial account at my bank. I have been to the Gianduja Restaurant several times. Sometimes I go over there for lunch and sometimes for supper. Everybody in San Francisco who knows Cabiale has nothing to say against him.

Testimony of Alberto Cesana, for Defendants.

ALBERTO CESANA, called as a witness on behalf of the defendants, testified:

I am a newspaper correspondent for the "Italia La Voce," an Italian newspaper. I know Cabiale, Donizello, Gabalio, Zurich and the rest of them. I know their general reputation for truth, honesty and integrity; from all I know they all have a good reputation. [61]

On cross-examination, the said witness testified:

I never heard of their being arrested for violations of the National Prohibition Act. I go to the Gianduja Restaurant often, about every night. The word "Gianduja" means a mask. In Italy every province is represented by a figure.

Testimony of E. M. Ratto, for Defendants.

E. M. RATTO, called as a witness on behalf of the defendants, and having been first duly sworn, testified:

I am fifty years of age and am by profession an

(Testimony of E. M. Ratto.)

interpreter. I know all of the defendants with the exception of Zurich and know their general reputation for truth, honesty and integrity. That reputation is good.

On cross-examination, the said witness testified:

I have sometimes visited the Gianduja Restaurant in the daytime for lunch; never in the evening because I never go to a cabaret.

THEREUPON counsel for the defendants renewed the motion previously made for the introduction in evidence of the tags of July 22d and 23d and upon this motion the following proceedings were had.

Mr. TRAMUTOLO.—If your Honor please, that practically concludes the case so far as the defendants are concerned; I still would like to renew my motion for the introduction of certain tags of July 22d and 23d, upon this theory, that if liquor was sold promiscuously on that day there would be entries on these tags; these tags, as I stated to you this morning, must be kept, by reason of the fact that the Government is entitled to a tax, and having the Government's receipt, there can be no inaccuracy upon the tags for the entire month. Now, if the theory of the Government is that liquor was promiscuously sold, every one of these tags would have to be changed in the meantime.

The COURT.—Not at all. Let us assume, I do not say this except as an assumption, that the contents of that pitcher was wine. Now, if somebody orders the wine, and they go to the pitcher and

bring it out. I suppose on the tags it would appear as grape juice. Other men order cocktails, and on the tags it would appear as cocktails. You cannot tell from the tags what the alcoholic content of the article is. You are undertaking to show by the fact [62] that these things were not registered there is no violation of the law. This is simply encumbering the record without proving anything.

Mr. TRAMUTOLO.—The point I want to make is, why should they be permitted to take isolated tags and we not be able to produce all of the tags?

The COURT.—They have produced tags that show the sale of liquor, and to counteract that you want to offer these tags that on their face do not show the sale of liquor.

Mr. TRAMUTOLO.—In other words, I want to introduce all the tags for those two days.

The COURT.—The motion will be denied.

Mr. TRAMUTOLO.—To which we reserve an exception.

Testimony of George R. Poultney, for the Government (Recalled in Rebuttal.)

GEORGE R. POULTNEY, recalled for the United States in rebuttal, testified:

Neither I nor anyone that was with me took any alcoholic liquor into the Gianduja Restaurant either on the 22d or 23d of July. Whatever liquor I secured there was secured from the inside, under my orders, as I have previously testified.

Testimony of W. Smith, for the Government (Recalled in Rebuttal).

W. SMITH, recalled for the United States in rebuttal, testified:

At the time I apprehended the defendant Forasiepi there was just one glass that was about a quarter full of wine.

On cross-examination, the said witness testified:

I smelled it, put it on my hand and put it to my lips. Forasiepi came thru the door into the bar where I was. He had a glass in his hand, just a glass. I put it with the other on the drainboard behind the bar and we left it there. I did not see it poured into any one of these bottles which have been produced here as exhibits. (To the Court: I testified that I jumped over the counter and found the pitcher of wine.) I did not testify that I poured the contents of that pitcher into any bottle. I do not know who did. I was not there at all times, as I said before. I left and ran after a man who was running through a door, and failed to overtake him. [63]

Testimony of H. C. Drew, for the Government (Recalled in Rebuttal).

H. C. DREW, recalled for the United States in rebuttal, testified:

I know what Maraschino is. I handled it some eleven or twelve years ago. It is used for beverage purposes.

(Testimony of H. C. Drew.)

On cross-examination, the said witness testified:

I know what sabajon is. I have always been given to understand that sherry was the liquor used for flavoring. I know that maraschino is a beverage, or a cordial, and has been used as such in cabarets and saloons for years.

Testimony of W. J. Jordan, for the Government (Recalled in Rebuttal).

W. J. JORDAN, recalled for the United States in rebuttal, testified: I was all alone at the time the liquor on the tray was upset. Prior to the time of the upsetting of the liquor I did not place my hand upon a waiter at all. I asked him what he had there, and he wanted to know who I was, and I showed him my badge, and said I was a revenue officer, and he took it and threw it up in the air and said it was grape juice. There was not any other kind of liquor in any of these glasses except what I have termed to be wine. There might be six glasses at the most, and they all contained red liquor in them; there was no beer, or lemonade, or anything at all.

THEREUPON both sides rested.

THEREUPON the said cause was argued by counsel, and the Court delivered its charge to the jury, as follows, to wit:

"Gentlemen, this is the first case that we have tried together; as you will be here for the term, it will probably not be the last. So, aside from the merits of this particular case, there are a few gen-

eral considerations that I would like to bring to the minds of the jury. The first is, of course, that the jury are the sole judges of the facts. With the province of the jury in that regard the Court is not disposed to interfere.

The next proposition is that the duty of the Court is to see that the facts are placed before the jury in accordance with the law, and to state to them the legal principles involved, which the jury will themselves apply to the facts as they find them to be.

We have here a number of defendants charged with a violation of the National Prohibition Law. Now, I need not say to you that whatever the sentiment [64] is for or against the enforcement of this Prohibition Law, that is a matter with which you and I are not concerned. Your duty, equally with mine, under your oaths, and my oath, is to administer the law as we find it, whether we agree with the principle or purpose of it, or not. We have in this court, awaiting trial some 200 or 300 defendants charged under this law. Whether these men are guilty or innocent will be determined by each jury as the facts are presented to them. The acquittal of a man who is guilty of any charge simply encourages other men to go out and commit a similar offense. No law can be enforced without the assistance of the jury, who have the final say in all criminal cases. Now, if juries are going to acquit men who are guilty, the result will be that we will never get through. Unfortunately, this is the only court in this District, extending from the

county of Monterey to the Oregon line, and from the Pacific Ocean to Nevada, upon which the enforcement of this law falls, and without the assistance of the jury we cannot enforce it at all. I say this not to influence you in passing upon this case, or any subsequent one, but to impress upon your minds that in dealing with these matters you are dealing with a very important subject. We are dealing with a law that has been adopted by a majority, we must abide by it and attempt to enforce it until such time, if that time ever comes, that the law may be changed. It is also true that men who violate this law do it because they make money out of it. There is no question of any principle involved in so far as they are concerned. When they violate the law, they violate it because they can make money by so doing. Now, I think this court has been quite vigilant in protecting the rights of citizens and individuals from the sometimes over-zealous acts of officers in the enforcement of this law, but the Court will be equally vigilant in upholding the officers in acts where they are acting within the law. There can be no question of the legality of the actions of the officers in the present case.

Now, that brings us to a consideration of the case itself. The defendants here are charged in a number of counts with a violation of this law.

The first count charges that they, upon the 22d of July, 1920, did maintain a common nuisance at 1549 Stockton Street, in the Gianduja hotel, restaurant, café and bar, in that they kept on hand there

unlawfully certain intoxicating liquor, [65] to wit, claret wine, containing one-half of 1 per cent or more of alcohol by volume and which was then fit for beverage purposes.

The second count charges a violation of the provisions of the act in that they had unlawfully in their possession at that same time and place certain claret wine.

The third count charges a violation of another provision of the act, in that at the same time and place they sold certain intoxicating liquor, to wit, claret wine.

The fourth count also charges at the same time and place a violation of the act in the sale of claret wine.

The fifth count also charges a violation of the act in the sale of intoxicating liquor, to wit, claret wine.

The sixth count charges also a violation of the act in the sale of intoxicating liquor, to wit, claret wine.

Now, the seventh count charges that on the 23d day of July, or the following day, at the same time and place, there was maintained a nuisance by keeping on the premises claret wine, jackass brandy, vermouth and maraschino, containing one-half of 1 per cent or more of alcohol by volume, and that the keeping of the liquor there on the place was unlawful.

The eighth count charges that they did unlawfully keep at the same time and place the same articles, claret wine, jackass brandy, vermouth and maraschino.

The ninth count charges that on the 23d day of July, at the same place, they unlawfully, wilfully and knowingly furnished to George Poultney and C. W. Herbert certain intoxicating liquor, to wit, claret wine.

The tenth count charges that they furnished to Poultney and Herbert certain intoxicating liquors, to wit, cocktails.

The eleventh count charges on the same day the sale of certain intoxicating liquor, whiskey. Now, I do not recall any evidence introduced as to the sale of whiskey upon that occasion, so that the eleventh count will be withdrawn from your consideration. [66]

Now, bearing upon these various charges we have certain provisions of the Prohibition Act, which I will call to your attention.

"The word 'liquor' or the phrase 'intoxicating liquor' shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter, and wine and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per cent or more of alcohol by volume which are fit for use for beverage purposes."

Section 21 provides that: "Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a com-

mon nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor, and upon conviction'' shall be punished as therein provided.

Section 33 provides:

''After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be *prima facie* evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title. Every person legally permitted under this title to have liquor shall report to the commissioner within ten days after the date when the eighteenth amendment of the Constitution of the United States goes into effect, the kind and amount of intoxicating liquors in his possession.''

Section 3 provides:

''No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect''—that was in January of the present year—''manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this act, and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.'' [67]

A sale, of course, is the transfer of personal property or title to personal property from one to another for a consideration, and, of course, the validity of that sale does not depend upon payment by the

purchaser immediately, or at any time, if the title is transferred at the time, he is entitled to collect at that time, or later, as he may be able to do. I make this suggestion in response to a suggestion of counsel that these liquors, if sold, were never paid for. That is, of course, immaterial. If they were delivered for a price, they were sold at the time, and it is not a question of the parties refusing to pay for them. Nor is it any defense to an action to say that the vermouth, for instance, that was found there, and which the chemist says contains 2.55 per cent, was purchased from somebody with the understanding that it contained a less per cent. The contents must be determined, not from the label, but by the contents themselves. Every man who is dealing with liquor of any kind, therefore, is bound upon his own responsibility to keep within the law. If it is found in his possession at an unlawful time or an unlawful place, he cannot say that he did not know that it contained one-half of 1 per cent or more of alcohol. It is his duty to know what it contains, otherwise, he violates the law.

It has also been suggested that maraschino is used for flavoring and cooking. That may be true, but the question here is not what it was used for, but whether it was fit for beverage purposes. The language of the act is "any spirituous, vinous, malt or fermented liquor, liquids and compounds, containing one-half of 1 per centum or more of alcohol by volume, which are fit for use for beverage purposes." If this maraschino was fit for use for beverage purposes and it was there in the bar room, not having

been reported, or not having been authorized to be kept there by the revenue officers, of course, it was there unlawfully, even though it might have been used for cooking purposes.

Speaking, now, from the side of the testimony presented by the Government, we have the presence in that establishment at that time of whiskey, brandy, wine, vermouth, maraschino and cocktails. Now, these liquors, if found there, as testified to by the officers and containing the contents that have been specified were there unlawfully. There is no authority for keeping them there, and the [68] burden is upon the party who has them there, as the statute says, to show that they were there lawfully. The question, therefore, for the jury to determine, is whether these liquors were there at that time, and, if so, who was responsible for their presence.

We have here eight defendants charged. Cabiale and Donizello are the proprietors. Gabalio is a floor walker, who seats the people. Bertolotti, I think, was the man who was designated as the bartender. The rest, I think are waiters. Now, there is this provision of the criminal law, which is as follows:

"Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal."

So that we have this situation: If the jury do find that the law was being violated there, if the two proprietors and the others who were employed there were aiding, and inducing, and encouraging one an-

other in the violation of the law, they are all equally guilty.

It is for the jury to determine whether any of these defendants are guilty. If so, which of them, and how many. In passing upon that question you will bear in mind the testimony presented both by the Government and by the defendants, and also this provision of the law that makes every one a principal who aids, abets, counsels, commands, induces or procures the commission of any offense against the law.

The defendants in this case, as in any case upon trial in this court for a criminal offense are presumed to be innocent, and that assumption attaches at the commencement of the trial and remains with them until the jury have determined otherwise by their verdict, if they so determine. The jury should not so determine unless they are satisfied by the evidence of the guilt of the defendants beyond a reasonable doubt.

A reasonable doubt is not every capricious or imaginary doubt that may arise out of sympathy of the jurors. It is such a doubt as a reasonable man may honestly entertain upon a full consideration of all the evidence. It is defined in law [69] to be that state of the case which, after an entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they can not say that they have an abiding conviction to a moral certainty of the truth of the charge. If you have such a reasonable doubt as to the guilt of these defendants, or any of them, it is your duty to give to such defendant the benefit of that doubt and acquit

him. If you have no such reasonable doubt, it is equally your duty to convict him.

Evidence has been introduced here tending to show that the reputation of these defendants, or some of them, for truth, honesty and integrity is good. That evidence you will consider with all the other evidence in this case, and if after a consideration of all the evidence, including that of good reputation, you have any reasonable doubt of the guilt of such defendant, you will, as I say, give him the benefit of that doubt and acquit him. On the other hand, if, after a consideration of all of the evidence, including that of good reputation, you have no reasonable doubt of his guilt, it is equally your duty to convict him notwithstanding such good reputation.

Now, you may return, if the evidence satisfies you as to the guilt of all of the defendants upon all the counts, a general verdict of guilty; that is, a conviction of all the defendants upon all the counts. If, on the other hand, you have a reasonable doubt as to the guilt of all the defendants upon all the counts, you may return a general verdict of not guilty; or, you can return a verdict finding certain defendants guilty and others not guilty, as the evidence shall appeal to you, upon the whole case, or upon any count.

You may take the information to the jury room with you. The clerk has prepared one form of verdict which you may use, or you may prepare your own verdict. [70]

The defendant requested the Court to give the following instructions:

"You are further instructed that the provisions of

the National Prohibition Act are to be liberally construed to the end that the use of intoxicating liquors as a beverage can be prevented; therefore, it must be proven to your satisfaction beyond a reasonable doubt and to a moral certainty that the liquor or liquors found on the premises were for the purpose of being sold as a beverage. (Section 3, Title 2, Act October 28, 1919).

"You are instructed that where a sale is alleged to have been made by an employee it must be proven to your satisfaction beyond a reasonable doubt and to a moral certainty that a benefit resulted to the employer by reason of the sale made by an employee; therefore, before you can convict the defendants at bar, or any of them, it must be proven to your satisfaction beyond a reasonable doubt and to a moral certainty which of the defendants derived the benefits of the sale or sales alleged to have been made."

The Court refused to give the said requested instructions, to which refusal counsel for the defendants duly excepted.

THEREUPON, to wit, on the twenty-first day of September, 1920, the jury retired and subsequently returned into court with a verdict finding the defendant Cabaile guilty on counts 2, 3 and 8 of the information and not guilty on the remaining counts; finding the defendant Donizello guilty on counts 2, 3, 8, 9 and 10 of said information and not guilty on the remaining counts; and finding all of the other defendants not guilty on all of the counts of the information.

THEREAFTER and on the sixth day of October, 1920, the day fixed for the pronouncement of judgment the defendants Cabiale and Donizello were called to the bar and asked if they had any legal cause to show why the judgment of the law and the sentence of the Court should not be pronounced upon them.

THEREUPON Chauncey F. Tramutolo, Esq., counsel for the said defendants presented to the Court and filed his motion for a new trial, which said motion is in the words and figures as follows, to wit: [71]

(Title of Court and Cause.)

Motion for New Trial.

Now comes the defendants Louis Cabiale and Andrew Donizello and move the above-entitled court to set aside and vacate the verdict heretofore rendered herein on the following grounds:

I.

That the said verdict is against the law.

II.

That the said verdict is against the evidence.

III.

That the said verdict is not supported by the evidence.

IV.

That the Court erred in refusing to give the instructions requested by the defendants, which instructions are as follows:

(a) 'You are further instructed that the provi-

sions of the National Prohibition Act are to be liberally construed to the end that the use of intoxicating liquors as a beverage can be prevented; therefore, it must be proven to your satisfaction beyond a reasonable doubt and to a moral certainty that the liquor or liquors found on the premises were for the purpose of being sold as a beverage. (Section 3, Title 2, Act October 28, 1919).'

(b) 'You are instructed that where a sale is alleged to have been made by an employee it must be proven to your satisfaction beyond a reasonable doubt and to a moral certainty that a benefit resulted to the employer by reason of the sale made by an employee; therefore, before you can convict the defendants at bar, or any of them, it must be proven to your satisfaction beyond a reasonable doubt and to a moral certainty which of the defendants derived the benefits of the sale or sales alleged to have been made.'

V.

Upon newly discovered evidence, which evidence is hereto attached and made a part of this motion in the form of an affidavit of S. V. Thomas, and which evidence defendants could not, with reasonable diligence, discover and produce at the time of trial.

C. F. TRAMUTOLO,

Attorney for Defendants and Plaintiffs in Error.

[72]

With the said motion and in support thereof the said counsel for said defendants presented and filed the following affidavit:

(Title of Court and Cause.)

Affidavit of S. V. Thomas.

State of California,
City and County of San Francisco,—ss.

S. V. Thomas, being first duly sworn, deposes and says:

That on and prior to the 23d day of July, 1920, he was employed by the United States Government as a prohibition enforcement officer charged with the duty of suppressing violations of the act of October 28, 1919, more commonly known as "The National Prohibition Act."

That your affiant on the 23d day of July, 1920 between the hours of 9:30 and 10:30 P. M., of said day in company with other prohibition officers entered the barroom premises of the Gianduja Hotel and Restaurant situated at 1549 Stockton Street in the City and County of San Francisco, State of California; that accompanying your affiant were prohibition enforcement officers R. A. Wolf and W. D. Smith; that your affiant personally searched the barroom premises of the Gianduja Hotel and Restaurant and on said premises found a bottle of vermouth and a bottle of an unknown liquid which affiant afterward ascertained to be mareschino; that on the drainboard of the bar of said premises, affiant found a pitcher containing an unknown liquid, a part of which liquid affiant poured into two empty Vichy Water bottles; that all of the property found in and about the barroom premises of said Gianduja Hotel and Restaurant was found by your affiant; that your

affiant after entering the said premises, at all times observed W. D. Smith guarding the door leading into the barroom premises, which said door is situate at the corner of Stockton and Union Streets, and that said W. D. Smith remained near said door for the purpose of preventing people from going out or coming into the barroom premises during the time that your affiant was searching the barroom premises; that your affiant was in a position to have seen W. D. Smith search the barroom premises if the said W. D. Smith had ever attempted to search the same.

That in two of the bottles labeled Vichy Water your affiant poured [73] therein certain liquids which liquids were brought in from the dining room of the Gianduja Hotel and Restaurant and that it is untrue with respect to these two bottles, that the same were found in or about the barroom premises.

That affiant further states that any and all property found by him on the barroom premises of the Gianduja Hotel and Restaurant were placed by him in a wooden box and that said wooden box containing the liquids so found, was taken to the prohibition enforcement office in the Appraiser's Building in the City and County of San Francisco; that the Government, in its information charged the above named defendants with having had in their possession a quantity of jackass brandy. With respect to this jackass brandy, affiant states that the said jackass brandy was not at any time or at all found in or about the premises of the Gianduja Hotel and Restaurant or barroom premises but that the said jackass brandy was on the person of your affiant at the time

of entering the barroom premises of the Gianduja Hotel and Restaurant and that affiant had procured said jackass brandy from another place which affiant had searched prior to going to the premises of the the Gianduja Hotel and Restaurant and that affiant inadvertently placed said jackass brandy amongst the property alleged to have been found on the premises of the Gianduja Hotel and Restaurant and barroom premises; that on one of the trial days of the above-entitled case, to wit, on September the 22d, 1920, affiant was interrogated in the presence of his wife by Assistant U. S. Attorney A. M. Hardie with respect to the testimony he would give when called as a witness for the Government; that in said interview with Assistant U. S. Attorney A. M. Hardie, your affiant stated that his testimony would be in substance as hereinabove stated in this affidavit; that thereafter Assistant U. S. Attorney A. M. Hardie requested affiant to go to the office of Assistant U. S. Attorney B. F. Geis in the Postoffice Building, with which request your affiant complied and in the conversation had with the Assistant U. S. Attorney B. F. Geis, affiant related the same conversation as affiant had with Assistant U. S. Attorney A. M. Hardie, which conversation was in substance as stated in this affidavit and that then and there the said Assistant U. S. Attorney B. P. Geis told affiant that he (Geis) would not [74] use affiant as a witness.

S. V. THOMAS.

Subscribed and sworn to before me this 2d day of October, 1920.

[Seal] ETTA LAIDLAW,

Notary Public in and for the City and County of San Francisco, State of California.

AT THE SAME TIME, the said counsel for said defendants presented and filed his motion in arrest of judgment, which said motion is in words and figures as follows, to wit:

(Title of Court and Cause.)

Motion in Arrest of Judgment.

Now comes the defendants Louis Cabiale and Andrew Donizello and each of them and move to arrest the judgment herein upon the following grounds, to wit:

I.

That the said information fails to state an offense against the laws of the United States of America.

II.

That the said information fails to state an offense against the laws of the United States in this; that it appears upon the face of said information that this Court has no jurisdiction of the offense which these defendants and each of them are charged with having committed.

III.

That there is no authority in law for the filing of information for the violation of the law which the defendants and each of them are charged with having violated.

Dated: This 6th day of October, 1920.

C. F. TRAMUTOLO,

Attorney for Defendants and Plaintiffs in Error.

[75]

THEREUPON, the motions for new trial and in arrest of judgment were argued by counsel, in consideration whereof, it was ordered by the Court that said motions and each of them be denied, to which rulings of the Court, counsel for the said defendants, then and there duly excepted. And the Court thereupon passed sentence upon the said defendants as appears from the judgment of record herein.

And now and within due and legal time thereafter, the said defendants Louis Cabiale and Andrew Donizello, present this their Bill of Exceptions to be used upon the prosecution of the writ of error in this cause and pray that the same be settled, approved and allowed.

Dated: This —— day of October, 1920.

CHAUNCEY F. TRAMUTOLO,

Attorney for said Defendants.

It is hereby stipulated that the foregoing bill of exceptions is in all respects full, true and correct and as such may be settled by the trial judge, and that same shall be and constitute the bill of exceptions in said cause.

FRANK M. SILVA,

United States Attorney.

By ALBERT M. HARDIE,

Assistant United States Attorney.

To the end that the matters and things therein contained may be and remain of record, the foregoing

bill of exceptions is hereby settled, approved and allowed as being in all respects full, true and correct.

M. T. DOOLING,
District Judge.

[Endorsed]: Rec'd a copy of the within bill of exceptions this 1st day of November, 1920.

FRANK M. SILVA,
U. S. Attorney.
ALBERT M. HARDIE,
Asst. U. S. Attorney.

Filed Apr. 6, 1921. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [76]

In the District Court of the United States for the Northern Division of the Northern District of California.

No. 8602.

THE UNITED STATES OF AMERICA

vs.

LOUIS CABIALE et al.

Verdict.

We, the Jury find as to the defendants at the bar, as follows:

Louis Cabiale, Guilty on Counts 2, 3, 8. Not Guilty on Counts 1, 4, 5, 6, 7.

Andrew Donizello, Guilty on Counts 2, 3, 8, 9, 10. Not Guilty on Counts 1, 4, 5, 6, 7.

P. Cavello, Head Waiter, Not Guilty on all Counts.

G. Bertolotti, Bartender, Not Guilty on all Counts.
Peter Zurich, Not Guilty on all Counts.
Attilio Parcellini, Not Guilty on all Counts.
Dante Forasiepi, Not Guilty on all Counts.
Frank Coppola, Not Guilty on all Counts.

WM. R. PENTZ,
Foreman.

[Endorsed]: Filed Sep. 22, 1920, at 6:20 o'clock P. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [77]

In the Southern Division of the United States District Court, Northern District of California, First Division.

No. 8602.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LOUIS CABIALE et al.,
Defendants.

Motion for New Trial.

Now comes the defendants Louis Cabiale and Andrew Donizello and move the above-entitled Court to set aside and vacate the verdict heretofore rendered herein, on the following grounds:

I.

That the said verdict is against the law.

II.

That the said verdict is against the evidence.

III.

That the said verdict is not supported by the evidence.

IV.

That the Court erred in refusing to give the instructions requested by the defendants, which instructions are as follows:

(a) "You are further instructed that the provisions of the National Prohibition Act are to be liberally construed to the end that the use of intoxicating liquors as a beverage can be prevented; therefore, it must be proven to your satisfaction beyond a reasonable doubt and to a moral certainty that the liquor or liquors found on the premises were for the purpose of being sold as a beverage. (Section 3, Title 2, Act October 28, 1919." [78]

(b) "You are instructed that where a sale is alleged to have been made by an employee it must be proven to your satisfaction beyond a reasonable doubt and to a moral certainty that a benefit resulted to the employer by reason of the sale made by an employee; therefore, before you can convict the defendants at bar, or any of them, it must be proven to your satisfaction beyond a reasonable doubt and to a moral certainty which of the defendants derived the benefits of the sale or sales alleged to have been made."

V.

Upon newly discovered evidence, which evidence is hereto attached and made a part of this motion in the form of an affidavit of S. V. Thomas, and which evidence defendants could not, with reason-

able diligence, discover and produce at the time of trial.

C. F. TRAMUTOLO,

Attorney for Defendants and Plaintiffs in Error.

[79]

In the Southern Division of the United States District Court, Northern District of California, First Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOUIS CABIALE et al.,

Defendants.

Affidavit of S. V. Thomas.

State of California,
City and County of San Francisco,—ss.

S. V. Thomas, being first duly sworn, deposes and says:

That on and prior to the 23d day of July, 1920, he was employed by the United States Government as a prohibition enforcement officer charged with the duty of suppressing violations of the Act of October 28, 1919, more commonly known as "The National Prohibition Act."

That your affiant on the 23d day of July, 1920, between the hours of 9:30 and 10:30 P. M. of said day in company with other prohibition officers entered the barroom premises of the Gianduja Hotel and Restaurant situated at 1549 Stockton

Street, in the city and county of San Francisco, State of California; that accompanying your affiant were prohibition enforcement officers R. A. Wolf and W. D. Smith; that your affiant personally searched the barroom premises of the Gianduja Hotel and Restaurant and on said premises found a bottle of vermouth and a bottle of an unknown liquid which affiant afterwards ascertained to be mareschino; that on the drainboard of the bar of said premises, affiant found a pitcher containing an unknown liquid, a part of which liquid affiant poured into two empty Vichy Water bottles; that all of the property found in and [80] about the barroom premises of said Gianduja Hotel and Restaurant was found by your affiant; that your affiant after entering the said premises, at all times observed W. D. Smith guarding the door leading into the barroom premises, which said door is situate at the corner of Stockton and Union Streets, and that said W. D. Smith remained near said door for the purpose of preventing people from going out or coming into the barroom premises during the time that your affiant was searching the barroom premises; that your affiant was in a position to have seen W. D. Smith search the barroom premises if the said W. D. Smith had ever attempted to search the same.

That in two of the bottles labeled Vichy Water your affiant poured therein certain liquids which liquids were brought in from the dining room of the Gianduja Hotel and Restaurant and that it is untrue with respect to these two bottles, that the

same were found in or about the barroom premises.

That affiant further states that any and all property found by him on the barroom premises of the Gianduja Hotel and Restaurant were placed by him in a wooden box and that said wooden box containing the liquids so found, was taken to the prohibition enforcement office in the Appraiser's Building in the city and county of San Francisco; that the Government, in its information charged the above named defendants with having had in their possession a quantity of jackass brandy. With respect to this jackass brandy, affiant states that the said jackass brandy was not at any time or at all found in or about the premises of the Gianduja Hotel and Restaurant or barroom premises, but that the said jackass brandy was on the person of your affiant at the time of entering the barroom premises of the Gianduja Hotel and Restaurant and that affiant had procured said jackass brandy from another place which affiant had [81] searched prior to going to the premises of the Gianduja Hotel and Restaurant and that affiant inadvertently placed said jackass brandy amongst the property alleged to have been found on the premises of the Gianduja Hotel and Restaurant and barroom premises; that on one of the trial days of the above-entitled case, to wit, on September the 22d, 1920, affiant was interrogated in the presence of his wife by Assistant U. S. Attorney A. M. Hardy, with respect to the testimony he would give when called as a witness for the Government; that in said interview with Assistant U. S. Attorney

A. M. Hardy, your affiant stated that his testimony would be in substance as hereinabove stated in this affidavit; that thereafter Assistant U. S. Attorney A. M. Hardy requested affiant to go to the office of Assistant U. S. Attorney B. F. Geis, in the Post Office Building, with which request your affiant complied and in the conversation had with the Assistant U. S. Attorney B. F. Geis, affiant related the same conversation as affiant had with Assistant U. S. Attorney A. M. Hardy, which conversation was in substance as stated in this affidavit and that then and there the said Assistant U. S. Attorney B. F. Geis told affiant that he (Geis) would not use affiant as a witness.

S. V. THOMAS,

Subscribed and sworn to before me this 2d day of October, 1920.

[Seal] ETTA LAIDLAW,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Oct. 2, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [82]

In the Southern Division of the United States District Court, Northern District of California, First Division.

No. (8602).

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOUIS CABIALE et al.,

Defendants.

Motion in Arrest of Judgment.

Now comes the defendants Louis Cabiale and Andrew Donizello, and each of them and move to arrest the judgment herein upon the following grounds, to wit:

I.

That the said information fails to state an offense against the laws of the United States of America.

II.

That the said information fails to state an offense against the laws of the United States in this; that it appears upon the face of said information that this Court has no jurisdiction of the offense which these defendants and each of them are charged with having violated.

III.

That there is no authority in law for the filing of informations for the violation of the law which the defendants and each of them are charged with having violated.

Dated: This second day of October, 1920.

C. F. TRAMUTOLO,

Attorney for Defendants and Plaintiffs in Error.

[Endorsed]: Filed Oct. 2, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [83]

At a stated term of the District Court of the United States of America, for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Saturday, the 2d day of October, in the year of our Lord, one thousand nine hundred and twenty. Present, the Honorable MAURICE T. DOOLING, Judge.

No. 8602.

UNITED STATES OF AMERICA

vs.

LOUIS CABIALE and ANDREW DONIZELLO.

Minutes of Court—October 2, 1920—Judgment.

This case came on regularly this day for pronouncing of judgment upon said defendants, who were present in Court with attorney, C. F. Tramutolo, Esq. B. F. Geis, Esq., Asst. U. S. Atty., was present on behalf of the United States. Said defendants were then called for judgment. Mr. Tramutolo moved the Court for a new trial, which motion the Court ordered denied, and to which order exception was entered. Mr. Tramutolo moved the Court in arrest of judgment, which motion the

Court ordered denied, and to which order exception was entered. Said defendants were then called for judgment. E. Partici and E. Perasso were duly sworn and examined on behalf of the United States. After hearing Mr. Tramutolo, and no cause appearing why judgment should not be pronounced herein against said defendants, the Court ordered that each of said defendants, for the offense of which he stands convicted, herein, be imprisoned for the period of six (6) months in the county jail, city and county of San Francisco, State of California, that said defendants stand committed to the custody of the U. S. Marshal to execute said judgments, and that commitments issue accordingly. Further ordered that execution of said judgments be stayed until October 6, 1920, and in event of appeal, said defendants' bonds for appearance herein be [84] fixed in the sum of $5,000.00 each, and that said defendants have until October 6, 1920, to give and file such bonds. [85]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 8602.

THE UNITED STATES OF AMERICA

vs.

LOUIS CABIALE and ANDREW DONIZELLO.

Judgment on Verdict of Guilty.

Convicted Viol. National Prohibition Act.

Ben F. Geis, Esq., Assistant United States Attorney, and the defendants with their counsel came into court. The defendants were duly informed by the Court of the nature of the information filed on the 29th day of July, 1920, charging them with the crime of violating the National Prohibition Act, of their arraignment and plea of not guilty; of their trial and the verdict of the Jury on the 22d day of September, 1920, to wit:

"We, the Jury, find as to the defendants at the bar, as follows: Louis Cabiale, Guilty on Counts 2, 3, 8. Not Guilty on Counts 1, 4, 5, 6, 7; Andrew Donizello, Guilty on Counts, 2, 3, 8, 9, 10; Not Guilty on Counts 1, 4, 5, 6, 7. * * *

"WM. R. PENTZ,
"Foreman."

The defendants were then asked if they had any legal cause to show why judgment should not be entered herein and no sufficient cause being shown or appearing to the Court, and the Court having denied a motion for new trial and a motion in arrest of judgment; thereupon the Court rendered its judgment; THAT, WHEREAS, the said Louis Cabiale and Andrew Donizello having been duly convicted in this Court of the crime of Violating the National Prohibition Act;

IT IS THEREFORE ORDERED AND ADJUDGED that the said Louis Cabiale and Andrew Donizello each be imprisoned for the period of six

(6) months in the County Jail, County of San Francisco, State of California. [86]

Judgment entered this 2d day of October, A. D. 1920.

WALTER B. MALING,
Clerk.
By C. W. Calbreath,
Deputy Clerk. [87]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 8602.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LOUIS CABIALE et al.,
Defendants.

Petition for Writ of Error.

Now come the defendants Louis Cabiale and Andrew Donizello and say that in the verdict and judgment heretofore rendered against them and each of them in the above-entitled cause and in the sentence of the Court pronounced against them and each of them on the second day of October, 1920, manifest error hath happened to the grievious damage of these defendants and of each of them, as by their assignment of errors filed herewith more fully appears, and that said defendants and each of

them are aggrieved by the said verdict, judgment and sentence.

WHEREFORE said defendants pray that a writ of error issue in their behalf to the United States Circuit Court of Appeals for the Ninth Circuit, to correct the said error, and that a full, true and complete transcript of the record and proceedings in this cause, duly authenticated, be sent to said United States Circuit Court of Appeals.

Dated: this 6th day of October, 1920.

C. F. TRAMUTOLO,
Attorney for said Defendants.

[Endorsed]: Due service and receipt of a copy of the within Petition for Writ of Error is hereby acknowledged this 6th day of October, 1920.

FRANK M. SILVA,
Attorney for Pl'ff.

Filed Oct. 6, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [88]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 8602.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LOUIS CABIALE et al.,
Defendants.

Assignment of Errors.

Now come Louis Cabiale and Andrew Donizello, defendants in the above-entitled cause and file the following assignment of errors upon which they and each of them will rely for the prosecution of the writ of error in the above-entitled cause, petition for which writ of error is filed at the same time as this Assignment of Errors:

I.

That said District Court erred in denying the motion of these defendants for a new trial.

II.

That said Court erred in denying the motion of said defendants in arrest of judgment.

III.

That said District Court had no jurisdiction to try the said cause, or to hear or to determine the same or to pronounce any judgment or sentence therein against these defendants or against any of them.

IV.

That each and every count of the information in the above-entitled cause upon which these defendants or both or either of them were convicted fails to state facts sufficient to constitute any crime or offense against the United States, in this, to wit: [89]

1. That count two of the said information, upon which count both of these defendants were convicted, does not state any crime or public offense against the United States, for that it is not alleged

in said count that the possession of the liquor therein referred to was illegal or unlawful upon the part of these defendants, or either of them, or that said liquor was possessed or used or intended by said defendants or either of them, for any illegal purpose.

2. That the third count of said information upon which count both of these defendants were convicted does not state any offense against the United States, in this, to wit, that said count contains no particulars of any offense or of any alleged sale of intoxicating liquor, and said count does not state that the sale of liquor therein referred to was for beverage purposes or for any illegal or unlawful purpose, or that either of these defendants was not authorized by law to make such sale.

3. That the eighth count of said information, upon which count both of these defendants were convicted, does not state any crime or offense against the United States in that there are no facts stated in said count to show that the alleged possession by these defendants of the intoxicating liquor therein referred to was unlawful or illegal.

4. That the ninth count of said information, upon which count the defendant Andrew Donizello was convicted, does not charge said defendant with any crime against the United States in this, to wit, that said count does not state any facts to show that the furnishing of the intoxicating liquor therein referred to by said defendant was unlawful or illegal.

5. That the tenth count of said information,

upon which count the defendant Andrew Donizello was convicted, does not charge said defendant with any crime against the United States for the reason [90] that there are no facts stated in said count showing or tending to show how or in what manner the furnishing of the intoxicating liquor, therein referred to, by said defendant, was illegal or unlawful.

V.

That the said District Court erred in refusing to give to the Jury the following instruction requested by said defendants:

"Gentlemen of the Jury: You are instructed that where a sale is alleged to have been made by an employee it must be proven to your satisfaction beyond a reasonable doubt and to a certainty that a benefit resulted to the employer by reason of the sale made by an employee; therefore, before you can convict the defendants at bar, or any of them, it must be proven to your satisfaction beyond a reasonable doubt and to a moral certainty, which of the defendants derived the benefits of the sale or sales alleged to have been made."

VI.

That the said Court erred in refusing to give to the jury the following instruction requested by said defendants:

"Gentlemen of the Jury: You are further instructed that the provisions of the National Prohibition Act are to be liberally construed to the end that the use of intoxicating liquors as to beverage can be prevented; therefore, it must be

proven to your satisfaction beyond a reasonable doubt and to a moral certainty that the liquor or liquors found on the premises were for the purpose of being sold as a beverage. (Section 3, Title 2, Act October 28, 1919)."

VII.

That the Court erred in overruling the objection made by counsel for the defendants to questions asked of and testimony given by the witness A. R. Shurtleff on his direct examination, which said questions, objections and testimony are in full as follows, to wit: [91]

"Q. On that evening, Mr. Shurtleff, will you state to the jury and court whether or not you observed liquor on the other tables, generally, or promiscuously in that place?

A. As we entered the place—

Mr. TRAMUTOLO.—Before that question is answered, whether or not they observed liquor on other tables is not the charge that we are required to meet here. The charge here is a specific charge of sale on nine counts of claret, and on one count of cocktails, and one count of whiskey; therefore, the question of whether there was liquor there on the premises cannot be binding on these defendants. Suppose the liquor was brought in, as we will prove, by patrons, how can that be binding on the defendants?

The COURT.—That probably will be a matter of defense. The objection is overruled.

Mr. TRAMUTOLO.—Exception.

Mr. GEIS.—State what you observed.

A. As we entered the place, I was surprised at the amount of colored liquid or liquor that was on the different tables. As I proceeded in, there were two couples sitting at a table, two men and two women, and I told them who I was, what my business was there, and proceeded to take the wine off the table. I gathered up all I could possibly carry from two tables at a time, and took it back to the counter, where John Kupser was sitting, and told him to take care of it. After taking one back, I went right up to the dining-room and went to the table where George Poultney and party were sitting. The wine and the cocktails which they had at this table they had removed from the top of the table, and were hiding it underneath. I told them who I was, and that I wanted what they had in the glasses, and took the cocktails and the claret away from them and took it back to Mr. Kupser, and he put it into this flask. [92]

VIII.

The Court erred in overruling objections made by counsel for the defendants to the introduction in evidence of certain checks or tickets taken from place of business of said defendants, which said checks or tickets were introduced during the testimony of the witness H. M. Kupser, and the Court further erred in the comments which it made at the time of the introduction of said evidence, as follows, to wit:

Mr. TRAMUTOLO.—If your Honor please, if the Government proposes now to introduce these checks, I certainly object to their introduction on the

ground that there is no means of identifying them.

The COURT.—He says he knows them.

Mr. GEIS.—Q. Are they in the same condition now that they were when you got them?

A. They are.

Q. With the exception that they are torn apart?

A. Yes.

IX.

The Court erred in admitting in evidence, over the objection of the defendant, certain bottles of liquor and in making various comments upon the same, which said proceedings occurred during the testimony of the witness R. F. Love, and were as follows, to wit:

Q. I hand you United States Exhibit No. 4 for Identification, and ask you if you ever saw that bottle before, and its contents? A. Yes.

Q. At the time that the bottle was handed to you, was it sealed? A. It was.

Q. And did you analyze it?

A. I did; I determined the alcoholic content of it.

Q. What did it analyze? A. 33.1 per cent.

Q. Alcohol? A. Yes.

The COURT.—Q. By volume? A. By volume.

Mr. GEIS.—Q. By the way, who did you receive that bottle from? A. From Mr. Estell. [93]

Q. I show you United States Exhibit 5 for identification and ask you if you ever saw that bottle before, and if you analyzed it? A. Yes, I did.

Q. And what was the result?

A. Alcohol, 2.55 per cent, by volume.

Q. And I hand you a bottle referred to as being

in the box, and ask you if you have ever seen that bottle before? A. I have.

Q. Did you also receive that from Mr. Estell?

A. Yes.

Q. And did you make a chemical analysis of it?

A. I did.

Q. With what result?

A. Alcohol, 17.8 per cent by volume.

Q. And I hand you another one heretofore testified to, have you seen that bottle before?

A. Yes.

Q. And did you make a chemical analysis of its contents? A. Yes.

Q. With what result?

A. Alcohol, 48.6 per cent by volume.

The COURT.—Q. Do you know what liquor it is?

A. I think that one contained whiskey.

Mr. GEIS.—Q. And this one, do you remember what this one contained?

A. No, I didn't decide what that was.

Q. But some alcoholic liquor? A. Yes.

Q. I hand you another bottle, testified as being in the box, and ask you if that was handed you by Mr. Estell? A. It was.

Q. And did you make a chemical analysis of that?

A. Yes, I did.

Q. With what result?

A. Alcohol, 45.25 per cent by volume.

Q. And, in your best judgment, what was it?

A. I think brandy, but I am not sure.

Q. And also another bottle testified to as having been in the box. Did you ever see that before?

A. Yes, I did.

Q. And did you make a chemical analysis of that one? A. Yes.

Q. With what result? A. 45.25 per cent.

[94]

The COURT.—Q. That would be about 90 proof?

A. Yes, sir.

Mr. GEISS.—Q. And what, in your best judgment, was that?

A. I did not decide. I didn't have very much time to work on it, and I didn't decide.

Mr. GEISS.—We offer them in evidence.

Mr. TRAMUTOLO.—To which we object as immaterial, irrelevant and incompetent, there being no evidence here—

The COURT.—Who labeled these bottles?

Mr. GEIS.—The labels that are placed on these bottles were placed by the chemist; Chemist No. 584; September 20, 1920; Gianduja Café; Brandy; alcoholic content; Officers Poultney and others. They all contain the same label, your Honor, with the exception of the content.

Mr. TRAMUTOLO.—The testimony of Mr. Poultney was that he did not find any of this property there, and he didn't see it found.

The COURT.—I don't attach much importance to that objection, Mr. Tramutolo; he saw it in the box on the counter in the barroom.

Mr. TRAMUTOLO.—That is just the point, your Honor; I don't believe that there was any testimony that Mr. Poultney saw it in the box.

The COURT.—Well, I am willing to let it go to the jury on that proposition.

Mr. TRAMUTOLO.—I reserve an exception. The labels, as they appear, were signed by Mr. Poultney.

The COURT.—The objection is overruled.

Mr. TRAMUTOLO.—I reserve an exception.

X.

The Court erred in refusing to admit certain evidence offered by said defendants, as following, to wit: [95]

Mr. TRAMUTOLO.—If your Honor please, that practically concludes the case so far as the defendants are concerned; I still would like to renew my motion for the introduction of certain tags of July 22d and 23d, upon this theory, that if liquor was sold promiscuously on that day there would be entries on these tags; these tags, as I stated to you this morning, must be kept, by reason of the fact that the Government is entitled to a tax, and having the Government's receipt there can be no inaccuracy upon the tags for the entire month. Now, if the theory of the Government is that liquor was promiscuously sold, every one of these tags would have to be changed in the meantime.

The COURT.—Not at all. Let us assume, I do not say this except as an assumption, that the contents of that pitcher was wine. Now, if somebody orders the wine, and they go to the pitcher and bring it out. I suppose on the tags it would appear as grape juice. Other men order cocktails, and on the tags it would appear as cocktails. You cannot tell

from the tags what the alcoholic content of the article is. You are undertaking to show by the fact that these things were not registered there is no violation of the law. This is simply encumbering the record without proving anything.

Mr. TRAMUTOLO.—The point I want to make is, why should they be permitted to take isolated tags and we not be able to produce all of the tags?

The COURT.—They have produced tags that show the sale of liquor, and to counteract that you want to offer these tags that on their face do not show the sale of liquor.

Mr. TRAMUTOLO.—In other words, I want to introduce all of the tags for those two days.

The COURT.—The motion will be denied.

Mr. TRAMUTOLO.—To which we reserve an exception. [96]

WHEREFORE, said defendants pray that their petition for a writ of error be allowed and that the judgment of the said District Court be reversed.

Dated this 6th day of October, 1920.

C. F. TRAMUTOLO,
Attorney for said Defendants.

[Endorsed]: Due service and receipt of a copy of the within Assignment of Errors is hereby acknowledged this 6th day of October, 1920.

FRANK M. SILVA,
Attorney for Plaintiff.

Filed Oct. 6, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [97]

At a stated term of the District Court of the United States of America for the Northern District of California First Division, held at the court-room thereof, in the city and county of San-Francisco, on Wednesday, the 6th day of October, in the year of our Lord one thousand nine hundred and twenty. Present, The Honorable MAURICE T. DOOLING, Judge.

No. 8602.

UNITED STATES OF AMERICA

vs.

LOUIS CABIALE and ANDREW DONIZELLO.

Minutes of Court—October 6, 1920—Order Allowing Writ of Error.

On motion of C. F. Tramutolo, Esq., attorney for defendants herein, and presenting petition for writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgments heretofore entered herein, the Court ordered that said appeal be allowed and that pending determination thereof, said defendants be allowed to be admitted to bail in the sum of Five Thousand ($5000.00) Dollars each, and that they each have one day from the date hereof within which time to file such bond. [98]

In the Southern Division of the United States District Court, Northern District of California, First Division.

No. 8602.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOUIS CABIALE et al.,

Defendants.

Order Allowing Writ of Error.

Upon the filing of the petition for a writ of error in the above-entitled cause and GOOD CAUSE APPEARING THEREFOR,

IT IS HEREBY ORDERED that the said petition for a writ of error be allowed as to said defendants Louis Cabiale and Andrew Donizello, and each of them, and that the clerk of the above-entitled Court be directed and he is hereby directed to transmit to the clerk of the Circuit Court of Appeals in and for the Ninth Circuit, a full, true and complete transcript of the record of proceedings in the above-entitled cause and that during the pendency of said writ of error all proceedings in this Court be suspended and stayed, and that the said defendants and each of them be admitted to bail in the sum of Five Thousand Dollars each.

Dated this 6th day of October, 1920.

M. T. DOOLING,

Judge.

[Endorsed]: Filed Oct. 6, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [99]

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 99 pages, numbered from 1 to 99, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the case of The United States of America, vs. Louis Cabiale and Andrew Donizello, No. 8602, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on writ of error (copy of which is embodied herein), and the instructions of the attorney for defendants and plaintiffs in error herein.

I further certify that the cost for preparing and certifying the foregoing transcript on writ of error is the sum of Forty-two Dollars and Ten Cents ($42.10) and that the same has been paid to me by the attorney for the plaintiffs in error herein.

Annexed hereto are the original writ of error (page 101), return to writ of error (page 104) and original citation on writ of error (page 105).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 26th day of April, A. D. 1921.

[Seal] WALTER B. MALING,
Clerk,
By C. M. Taylor,
Deputy Clerk. [100]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 8602.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOUIS CABIALE et al.,

Defendants.

Writ of Error.

United States of America,—ss.

The President of the United States of America to the Honorable Judges of the Southern Division of the United States District Court for the Northern District of California, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between the United States of America, plaintiff, and Louis Cabiale and Andrew Donizello et al., defendants, manifest error hath happened, to the great damages of the said Louis Cabiale and Andrew Donizello, as by their complaint appears;

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all

things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, ought to be done. [101]

WITNESS, the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States, the 6th day of October in the year of our Lord one thousand nine hundred and twenty.

[Seal] Attest: WALTER B. MALING,
Clerk of the U. S. District Court for the Northern District of California.

By C. M. Taylor,
Deputy Clerk.

AND NOW, to wit, on this 6th day of October 1920, IT IS ORDERED, that the foregoing writ of error be and the same is hereby allowed.

M. T. DOOLING,
District Judge. [102]

Due service and receipt of a copy of the within writ of error is hereby admitted this 6th day of October 1920.

FRANK M. SILVA,
Attorney for Plff.

[Endorsed]: No. 8602. In the Southern Division of the United States District Court for the Northern

District of California, First Division. United State of America, Plaintiff, vs. Louis Cabiale et al., Defendants. Writ of Error. Filed Oct. 6, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [103]

Return to Writ of Error.

The answer of the Judges of the District Court of the United States of America, for the Northern District of California, to the within writ of error:

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this writ was on the sixth day of October, A. D. 1920, duly lodged in the case in this court for the within named defendant in error.

By the Court.

[Seal] WALTER B. MALING,
Clerk U. S. District Court, Northern District of California.

By C. M. Taylor,
Deputy Clerk. [104]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

LOUIS CABIALE and ANDREW DONIZELLO,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Citation on Writ of Error.

United States of America,—ss.

The President of the United States to the United States of America, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city and county of San Francisco in the State of California, within thirty (30) days from the date hereof, pursuant to a Writ of Error duly issued and now on file in the Clerk's office of the United States District Court for the Southern Division of the Northern District of California, wherein Louis Cabiale and Andrew Donizello are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties aforesaid in that behalf.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 6th day of October 1920.

M. T. DOOLING,
United States District Judge. [105]

Due service and receipt of a copy of the within Citation on Writ of Error is hereby admitted this 6th day of October, 1920.

FRANK M. SILVA,
Attorney for Plff.

[Endorsed]: No. 8602. In the United States Circuit Court of Appeals for the Ninth Circuit. Louis Cabiale and Andrew Donizello, Plaintiffs in Error, vs. United States of America, Defendant in Error. Citation on Writ of Error. Filed Oct. 6, 1920. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [106]

[Endorsed]: No. 3679. United States Circuit Court of Appeals for the Ninth Circuit. Louis Cabiale and Andrew Donizello, Plaintiffs in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

Filed April 26, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

LOUIS CABIALE and ANDREW DONIZELLO,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Order Extending Time to and Including December 15, 1920, to File Record and Docket Cause.

Good cause appearing therefor, IT IS HEREBY ORDERED that the plaintiffs in error in this cause may have and they are hereby granted to and including the 15th day of December, 1920, in which to file the record thereof and docket the case with the clerk of this Court, and the time for such filing and docketing is hereby enlarged accordingly.

Dated: This first day of November, 1920.

WM. W. MORROW,
Circuit Judge.

Rec'd a copy of the within order this 1st day of November, 1920.

FRANK M. SILVA,
U. S. Attorney.
ALBERT M. HARDIE,
Asst. U. S. Attorney.

[Endorsed]: No. 3679. In the United States Circuit Court of Appeals for the Ninth Circuit. Louis

Cabiale and Andrew Donizello, Plaintiffs in Error, vs. United States of America, Defendant in Error. Order Under Rule Sixteen Enlarging Time within which to File Record and Docket Cause. Filed Nov. 5, 1920. F. D. Monckton, Clerk. Re-filed Apr. 26, 1921. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

LOUIS CABIALE and ANDREW DONIZELLO,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Order Extending Time to and Including February 1, 1921, to File Record and Docket Cause.

Good cause appearing therefor, IT IS HEREBY ORDERED that the plaintiffs in error in this cause may have and they are hereby granted to and including the first day of February, 1921, within which to file the record thereof and docket the case with the clerk of this court, and the time for such filing and docketing is hereby enlarged accordingly.

Dated: this 14th day of December, 1920.

W. H. HUNT,
Circuit Judge.

The above order extending time within which docket cause is hereby approved.

FRANK M. SILVA,
U. S. Attorney.

Receipt and service of within is hereby admitted this 14th day of December, 1920.

FRANK M. SILVA,
U. S. Atty.
By J. I. COPESTAKE,

[Endorsed]: No. 3679. In the United States Circuit Court of Appeals for the Ninth Circuit. Louis Cabiale and Andrew Donizello, Plaintiffs in Error, vs. United States of America, Defendant in Error. Order Under Rule Sixteen Enlarging the Time Within Which to File Record and Docket Cause. Filed Dec. 14, 1920. F. D. Monckton, Clerk. Refiled Apr. 26, 1921. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

LOUIS CABIALE and ANDREW DONIZELLO,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Order Extending Time to and Including March 1, 1921, to File Record and Docket Cause.

Good cause appearing therefor, IT IS HERE-

BY ORDERED that the plaintiffs in error in this cause may have and they are hereby granted to and including the first day of March, 1921, within which to file the record thereof and docket the case with the clerk of this court, and the time for such filing and docketing is hereby enlarged accordingly.

Dated: This 31st day of January 1921.

WM. W. MORROW,
Circuit Judge.

The above order extending time within which to docket cause is hereby approved.

FRANK M. SILVA,
U. S. Attorney.
By ALBERT M. HARDIE,
Asst. U. S. Attorney.

[Endorsed]: No. 3679. In the United States Circuit Court of Appeals for the Ninth Circuit. Louis Cabiale and Andrew Donizello, Plaintiffs in Error, vs. United States of America, Defendant in Error. Order Extending Time. Filed Feb. 1, 1921. F. D. Monckton, Clerk. Re-filed Apr. 26, 1921. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 8602.

LOUIS CABIALE and ANDREW DONIZELLO,
Plaintiffs in Error.

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Order Extending Time to and Including April 1, 1921, to File Record and Docket Cause.

Good cause appearing therefor, IT IS HEREBY ORDERED that the plaintiffs in error in this cause may have and they are hereby granted to and including the first day of April, 1921, within which to file the record thereof and docket the case with the clerk of this court, and the time for such filing and docketing is hereby enlarged accordingly.

Dated: This 26th day of February, 1921.

WM. W. MORROW,
Circuit Judge.

The above order extending time within which to docket cause is hereby approved.

FRANK M. SILVA,
United States Attorney.
By BEN F. GEIS,
Asst. U. S. Attorney.

[Endorsed]: No. 3679. No. 8602. In the United States Circuit Court of Appeals for the Ninth Circuit. Louis Cabiale and Andrew Donizello, Plaintiffs in Error, vs. United States of America, Defendant in Error. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including Apr. 1, 1921, to File Record and Docket Cause. Filed Feb. 26, 1921. F. D. Monckton, Clerk. Re-filed Apr. 26, 1921. F. D. Monckton, Clerk.